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SELECTION OF CASES

DECIDED BY THE

NATIVE APPEAL COURT

FOR THE

TRANSKEIAN TERRITORIES

DURING THE YEARS

1923 - 1927.

COMPILED BY

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Formerly Clerk of the Native Appeal Court

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PREFACE.

The present volume of reports covers the period 1923 to 1927, and should be cited as N.A.C. 5.

The general arrangement of the previous volume has been retained but it has been decided to follow the practice pursued in the South African Law Reports of publishing the names of all the members of the Court.

As the personnel of the Native Appeal Court is subject to constant change it is thought that this information will be of interest both to judicial officers and practitioners in the Transkeian Territories.

G.M.

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NATIVE APPEAL COURT REPORTS.

1924, December 13.

Iusikisiki.

SINGQUMA *vs.* SIMENUKANE.

(Tabankulu Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson
and W. C. H. B. Garner as Assessors.

*Abduction—Bopa beast—Father not liable if paid dowry for
married son.*

The facts of the case are not material.

JUDGMENT.

By President: The Plaintiff claimed from the Defendant a "bopa" beast on the ground that his son eloped with the former's daughter, and that they thereafter failed to offer marriage.

The Defendant denied liability on the ground that his son was a married man whose dowry he had paid.

The marriage and payment of dowry by defendant was admitted.

The question having been put to the Native Assessors they state unanimously that when a man has provided any of his sons with a wife and paid the dowry for her he is not liable for a "bopa" beast should the son thereafter elope with another girl. In view of this statement of native custom the appeal is dismissed with costs.

1926, March 16.

Butterworth.

ZONDANI AND ZWELIBANZI *vs.* GOVA.

(Nqamakwe Case.)

Before W. T. Welsh, C.M., President, with F. H. Brownlee
and W. F. C. Trollip as Assessors.

Adultery—Proof—Sufficiency of.

The facts of this case are not material.

JUDGMENT.

By President: In the opinion of this Court there is not sufficient evidence to support the Magistrate's finding. The Defendant has consistently denied the charge and there is no evidence of a catch or of "ntlonze," and the only direct testimony against the Defendant is that of the Plaintiff's wife Nosoliti, who when first accused, named Harry Yoyo as her paramour.

At the close of the Defendant's case, the Court of its own motion, called further witnesses, which, if the Plaintiff had at that stage established his case, is not understood.

The further evidence in this Court's opinion does not strengthen the Plaintiff's claim. The Court has laid down repeatedly that in adultery cases the Plaintiff must prove his allegations beyond all reasonable doubt. In this case the evidence adduced on behalf of the Plaintiff is not sufficient to entitle him to succeed.

The appeal will be allowed with costs and judgment in the Court below altered to one for the Defendant with costs.

1926, April 14.

Lusikisiki.

BASA *vs.* BASA.
(Flagstaff Case.)

Before O. M. Blakeway, Magistrate, Lusikisiki, President,
with W. C. H. B. Garner and R. C. E. Klette as Assessors.

Adultery—"Teleka"—*Abandonment of wife—Damages.*

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The claim is one for three head of cattle or their value £15 being damages sustained by the Plaintiff by reason of Defendant having committed adultery with his (Plaintiff's) wife Mamsindweni. Judgment was entered for Defendant with costs.

It appears that Mamsindweni was "telekaed" some years ago and the Magistrate has held that Plaintiff took no steps for her recovery within a reasonable period and that his neglect amounted to an abandonment of his wife.

There are very conflicting decisions in regard to a woman under "teleka" and the point has once more been put to the Native Assessors, who state:—

"We have no custom which prevents a man from claiming damages from an adulterer when his wife is under "teleka." If a woman under "teleka" commits adultery, her people may claim damages and deduct "teleka" cattle before handing over the damages to the husband.

"A woman remains a man's wife until the dowry has been returned or action has been taken by the father against the husband, no matter how many years she has remained at her people's kraal under teleka. The husband has the right to sue any man to whom his wife has been given over in marriage.

“ If the husband neglects his wife under “ teleka ” the father of the woman should sue the husband or cancel the marriage.

“ We disagree with the opinion expressed in the case of *Quza versus Masilana* (N.A.C. 3, p. 196).”

This Court following the opinion expressed by the Native Assessors holds that Plaintiff is entitled to damages. The Attorney for Appellant claims that Plaintiff, even if neglectful, is entitled to one beast.

The appeal is allowed with costs, and the judgment altered to one for Plaintiff for one beast or its value £5 and costs.

1927, August 8.

Lusikisiki.

BOMELA vs. DINGILIXWE.

(Bizana Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and F. C. Pinkerton as Assessors.

Adultery and pregnancy—Neglect of wife by husband—Usual award under Native custom reduced.

Dingilixwe claimed from Dennis 10 head of cattle or £50 as damages for adultery and pregnancy. The evidence proved that the former's wife had been rendered pregnant by the latter. It was also clear that the former had lived apart from and neglected his wife for a considerable number of years during which period she was maintained by her people. It was during this time that she was made pregnant. The Magistrate awarded Plaintiff 5 head of cattle or £25 damages.

The Defendant appealed on the grounds that the Plaintiff had suffered no damages or at the most nominal damages only.

JUDGMENT.

By President: The Magistrate believed the evidence adduced on behalf of the Plaintiff and this Court is not in a position to say he erred.

In regard to the damages awarded this Court is of opinion they are excessive. It is clear that the Plaintiff has lived apart from and neglected his wife for many years during which she has had to be maintained by her people. He has, in the opinion of this Court, not suffered much damage and is therefore not entitled to the award usually made in cases of adultery and pregnancy.

The appeal will be allowed with costs and judgment in the Court below altered to one for the Plaintiff for two cattle or £10 and costs.

1926, May 18.

Kokstad.

TSHAMBULUKA *vs.* GCWAYIBE.

(Mount Frere Case.)

Before J. M. Young, Ag. C.M., with W. G. Wright and
H. E. Grant as Assessors.

Adultery—Proof—Discrepancies in evidence.

The facts of the case are not material.

JUDGMENT.

By President: In the opinion of this Court the Magistrate has not given sufficient weight to the discrepancies in the evidence adduced on behalf of the Plaintiff. It is almost impossible to reconcile the evidence of any two witnesses on any of the following points:—

- (a) The time of the alleged adultery.
- (b) The identification of the mtlonze.
- (c) The nature of the floor of the hut in which the adultery is alleged to have taken place; and
- (d) The question as to whether a sack or a blanket was spread on the floor.

In cases of this nature, the Court has laid down repeatedly that the strongest possible proof of the commission of the act must be adduced. Here the discrepancies are so many and so grave that this Court is of opinion that it would not be safe to disregard them.

The appeal is allowed with costs and the Magistrate's judgment altered to absolution from the instance with costs.

Note: One of the Magisterial Assessors, Mr. W. G. Wright, dissented.

1926, July 13.

Umtata.

BALENI *vs.* BUBI.

(Mqanduli Case.)

Before J. M. Young, Ag. C.M., President, with W. J. Davidson and G. M. B. Whitfield as Assessors.

Adultery—Proof—Sufficiency of evidence of.

The facts of the case are not material.

JUDGMENT.

By President: The only evidence of adultery in this case is that of the Plaintiff himself supported by the production of a blanket and two receipts. Appellant denies that the blanket is his property and admits that the receipts are his property.

In view of the repeated decisions of this Court in cases of this nature, the evidence is wholly insufficient to warrant a judgment in favour of the Plaintiff.

The appeal is allowed with costs and the Magistrate's judgment altered to absolution from the instance with costs.

1926, July 14.

Umtata.

NGONYOLO *vs.* BEYANA.

(Tsolo Case.)

Before J. M. Young, Ag. C.M., President, with W. J. Davidson and G. M. B. Whitfield as Assessors.

Adultery—Evidence in proof of—Woman found at night in Defendant's hut.

The facts of the case are not material.

JUDGMENT.

By President: In the opinion of this Court there is ample evidence on the record to justify the Magistrate in finding that a marriage subsisted between Respondent and Makwetshube and further that Makwetshube was found at night in the Appellant's hut. In these circumstances he was correct in holding that adultery had taken place.

The appeal is dismissed with costs.

1926, November 15.

Umtata.

MANGALISO *vs.* FEKADE AND NOHANISI.

(St. Mark's Case.)

Before J. M. Young, A.C.M., President, with G. M. B. Whitfield and R. C. E. Klette as Assessors.

Adultery—Incestuous—Sufficient cause to claim dissolution of marriage and restoration of dowry.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Appellant, Plaintiff in the Magistrate's Court sued the Respondents in an action in which he alleged that the second Respondent, who is his wife, had committed adultery with his—Appellant's—brother and that in consequence of her misconduct he had requested her to return to her father, the first named Respondent, as being guilty of incest he was entitled to regard the marriage as dissolved. He claimed an order of Court dissolving the marriage and judgment for the return of the dowry paid for his wife to the first named Respondent.

Respondents excepted to the summons on the ground that it disclosed no cause of action in as much as the facts alleged did not constitute in Native Law and Custom a sufficient ground for the dissolution of a marriage by Native rites.

The Magistrate after consulting Chief Falo Mgudlwa on the question of custom allowed the exception with costs and against this ruling an appeal has been brought.

Ordinarily adultery on the part of a wife married according to Native custom is not a sufficient cause for the husband to divorce his wife and recover the dowry but there are exceptions to this rule.

In the opinion of this Court incest on the part of the wife is one of these exceptions and would justify the husband in claiming a dissolution of the marriage and the restoration of the dowry.

The appeal is allowed with costs, the Magistrate's ruling set aside, and the case returned to him to be dealt with on its merits.

1926, November 3.

Butterworth.

TOMOSE *vs.* JELE.

(Idutywa Case.)

Before J. M. Young, A.C.M., President, with F. H. Brownlee and A. L. Barrett as Assessors.

Adultery—Claim of damages—Marriage by Christian rites—Plaintiff as adulterer, barred from claiming damages.

Plaintiff sued Defendant for three head of cattle or £15 as damages for adultery committed by the Defendant with Plaintiff's wife Sarah Ann. Plaintiff married Sarah Ann by Christian rites.

While Sarah Ann was away in Cape Town, Plaintiff lived in adultery with one Tunzi's daughter by whom he had two children. On Sarah Ann's return Tunzi's daughter left Plaintiff's kraal.

JUDGMENT.

By President: In the case of Mark Nkomentaba *versus* Office Mtimde* heard in this Court at Kokstad in April, 1925, it was decided that the Plaintiff, by contracting a marriage according to Christian rites, ceased, in the matter of marriage, to follow native custom and that his action for damages for adultery must be dealt with according to Colonial Law.

In this case the marriage between the Appellant and his wife was contracted according to the law of the Colony and any action arising out of such marriage must be dealt with under Colonial Law.

The Appellant was living in adultery, and following the decision in the case of Biccard *versus* Biccard and Fryer, (Vol. II, Cape Times Reports, p. 353,) this Court is of opinion that he cannot succeed in his claim for damages.

The appeal is dismissed with costs.

* Page 127 of these reports.

1926, November 15.

Umtata.

MWANDA vs. SIMAYILE.

(St. Marks Case.)

Before J. M. Young, A.C.M., President, with G. M. B. Whitfield and R. C. E. Klette as Assessors.

Adultery—Damages—Condonation of wife's misconduct—Jurisdiction of Magistrate's Courts—Section 29, Proclamation No. 145/1923, in conjunction with Section 6 (2), Proclamation No. 142/1910—No final breach between spouses.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff sued the Defendant in the Magistrate's Court for the sum of £25 as damages for adultery committed by him with Plaintiff's wife.

The facts, as found by the Magistrate, are:—

- (1) That the Plaintiff and his wife, both of whom are Natives, were married according to Christian rites during the year 1911.
- (2) That Plaintiff was away at work continuously from January, 1923 to October, 1925, and, that whilst he was so absent from home, the Defendant was a frequent visitor at his kraal and, on numerous occasions, had sexual relations with his wife, resulting in her pregnancy and the birth of a female child in December, 1925.
- (3) That, on Plaintiff's return from work, he discovered that his wife had been unfaithful and that she was pregnant, but, notwithstanding this, he condoned her offence and has continued to live and cohabit with her.

On these facts the Magistrate found for Plaintiff and entered judgment in his favour for the amount claimed and costs.

Against this finding an appeal is brought on several grounds. For the purposes of this case however it is necessary to consider the following questions only:—

- (1) Had the Magistrate jurisdiction to adjudicate on the claim, and, (2), if so, whether, in view of the fact that there has been condonation of the misconduct and no final breach between the spouses, damages ought to be awarded.

The first of these questions must be answered in the affirmative. It was gone into fully in the case of Mark Nkomentaba *versus* Office Mtimde heard in this Court at Kokstad in April, 1925.* On that occasion the President in the course of a lengthy judgment said:—

“The Appellant, in his argument, relying on Section 29 of Proclamation No. 145 of 1923, contends that Section

* Page 127 of these Reports.

6 (2) of Proclamation No. 142 of 1910 excludes the jurisdiction of Magistrates' Courts in actions for damages for adultery where the marriage had been celebrated according to the law of the Colony, in that the action is one relating to or arising out of such a marriage and consequently must be decided in the Court of the Chief Magistrate or in a Superior Court."

"The interpretation of Section 6 (2) of Proclamation No. 142 of 1910 was considered in the case of *Mbadu versus Matshongo* (1920, E.D.L. 143), where the Court in the course of its judgment said that to ascertain the meaning of sub-section 2 of Section 6 of the Proclamation the previous sections must be referred to, and that these are questions of divorce, separation, inheritance, or rights of property arising out of Native marriages or in regard to the administration and distribution of the estate of any Native dying domiciled in the Transkeian Territories without leaving any widow or the issue of any marriage."

"If the contention that the jurisdiction of the Magistrate's Court is excluded in actions for damages for adultery where the marriage has been according to civil rites, on the ground that the question is one relating to or arising out of such a marriage, it must follow that Magistrates' Courts would have no right to adjudicate in cases where a man sues a third party for having defamed, assaulted or caused the death of his wife, a proposition which, in the opinion of this Court, is untenable."

"If it had been intended by Section 6 (2) of Proclamation No. 142 of 1910 to deprive Magistrates' Courts in these Territories, which then had unlimited civil jurisdiction, of the power to hear and determine actions of this nature such intention undoubtedly would have been expressed in clear and unambiguous language."

"In the opinion of this Court the terms of Section 6 (2) of Proclamation No. 142 of 1910 cannot be construed to mean that the jurisdiction of the Magistrates' Courts is excluded in actions against a third party for damages for adultery where the marriage was one according to civil rites, nor is it prepared to agree with the contention that Section 29 of Proclamation No. 145 of 1923 was intended to oust the jurisdiction of Magistrates' Courts in cases of this kind. In its opinion this exclusion was deliberately omitted from Section 37 of the Proclamation."

With regard to the second question the Plaintiff, by entering into a marriage according to Christian rites has, in the matter of marriage, contracted himself out of the operation of Native custom and his action for damages for adultery must be dealt with according to Colonial law.

In the case of *Biccard versus Biccard and Fryer*, where the question arose whether damages could be assessed where divorce is not granted, de Villiers, C.J., said:—

"I wish to make it quite clear that my opinion is not that such an action cannot under any circumstances be

brought without also bringing an action for divorce, because there may be such cases where the parties being Roman Catholics there would be conscientious scruples against bringing an action for divorce, and yet parties might intend to be separated for the rest of their lives. The remarks quoted could not apply to such a case. If the Court were satisfied that the breach was final and that there was no intention on the part of the husband to reap the fruit of his wife's adultery, I should say that the rule would fail and the Court might under such circumstances grant damages without decreeing divorce. But the case must be very exceptional indeed which would justify any Court or jury in giving damages for the wife's adultery, unless it is quite clear that there is a final breach between the parties and that the wife was not to live again with her husband, nor the husband to reap the fruits of her unchastity."

In the present case it is clear that the Plaintiff does not intend to be divorced from his wife and that there has been no final breach. The Plaintiff has not lost the society of his wife and in the opinion of this Court he is not entitled to damages. The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Defendant with costs.

1927, July 21.

Umtata.

NGQO *vs.* TWALANA.

(Mqanduli Case.)

Before J. M. Young, A.C.M., President, with F. N. Doran and W. C. H. B. Garner as Assessors.

Adultery—Connivance—Husband cannot recover damages.

The Respondent claimed damages from Appellant for adultery. He admitted in his evidence that he had connived at his wife's misconduct in the expectation of recovering damages from paramours.

JUDGMENT.

By President: In this case the Respondent states: "I left her (his wife) there to become pregnant if she went astray. My wife kept leaving me and wandering about and I left her at her people's kraal to become pregnant. I knew she was misconducting herself with men and left her to become pregnant so I could bring an action against someone. I could not prevent her so decided that the person who made her pregnant had to pay. My wife was wandering about and cattle were being demanded from me, so when she went to her people's kraal I left her there to become pregnant so that I could catch her."

In the opinion of this Court this conduct on the part of the Respondent amounted to connivance and he cannot recover damages.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Defendant with costs.

1923, March 22.

Umtata.

MTYA *vs.* DINANA AND MAHADI.

(Engcobo Case.)

Before J. M. Young, A.C.M., President, with R. H. Wilson
and J. W. Mitchell as Assessors.

Adultery—Catch—Quarrel between women.

Plaintiff sued Defendants in an action for damages for adultery and based his claim on a quarrel between his (Plaintiff's) wife Nosamsi, and another woman, Cilo, who objected to Nosamsi being first Defendant's lover, as she, Cilo, was first Defendant's "metsha."

The Magistrate sustained Defendant's exception that a quarrel between two women about a man not the husband of either, did not constitute a catch and was not a good cause of action for damages for adultery.

JUDGMENT.

By President: In view of the ruling in the cases of Bekizulu *versus* Mkonywana (4, N.A.C. p. 11) and "Raji" *versus* Silongalonga (4, N.A.C., p. 12) the appeal is dismissed with costs.

1923, March 23.

Umtata.

VELEBAYI *vs.* MENZIWA.

(Qumbu Case.)

Before J. M. Young, A.C.M., President with R. H. Wilson
and J. W. Mitchell as Assessors.

Adultery—Specific act must be proved.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Plaintiff sued Defendant for three head of cattle as damages for adultery alleged to have been committed by Defendant with Plaintiff's wife between the months of November, 1921 and January, 1923 and at Xotongo's ward on the 13th December, 1922.

Defendant denied the adultery and claimed in reconvention the sum of £5 as damages for assault.

The Magistrate gave judgment for Plaintiff as prayed and dismissed the counterclaim.

The evidence shows that on the 13th December, 1922, the Plaintiff found his wife in the early morning sitting in a donga near his land, that when he came up to them, Defendant got up and ran away. Plaintiff followed him. After going some distance Defendant turned and a fight ensued in which Defendant was worsted.

It is admitted that intercourse did not take place on that occasion.

The only evidence on the record of any previous intimacy between Defendant and Plaintiff's wife is a statement by her and a woman named Nofini, a near relative of hers.

The circumstances of this case are almost identical with those in the case *Bekizulu ka Tshingitshane versus Mkonywa* heard in the Appeal Court at Lusikisiki in December, 1922 (4 N.A.C., p. 11), the decision in which this Court feels bound to follow.

Sufficient reason has not been shown for disturbing the Magistrate's finding on the counterclaim.

The appeal is allowed with costs, and the Magistrate's judgment in so far as it affects the claim in convention, is altered to judgment for Defendant with costs.

1923, November 21.

Butterworth.

LANGA *vs.* MTWAZI.

(Idutywa Case.)

Before J. M. Young, A.C.M., President, with R. D. H. Barry and R. J. Macleod as Assessors.

Adultery—Damages—Court will not continue to award damages where continuous immorality takes place—Adultery of wife may not be made a source of gain—Remedy is to apply for return of dowry paid where wife lives in continuous adultery with another man.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: This is an appeal from the judgment of the Resident Magistrate, Idutywa, awarding the Respondent (Plaintiff in the Court below) three head of cattle or their value £15 as damages for adultery alleged to have been committed by Appellant with Respondent's wife.

On the 17th November, 1921, a similar action was heard in the same Court, between the same parties, and the Appellant was ordered by the Court to pay three head of cattle as damage. In that case, which has been put in, and now forms part of the record in the present case, the Appellant contended that the woman with whom he was accused of committing adultery was his wife and not the wife of Respondent. The Court found against him and held that the woman was Respondent's wife. Notwithstanding this decision the woman returned with Appellant to his kraal and has continued to live with him as his wife, and no action has been taken by Respondent or any attempt made to obtain her return or the return of her dowry.

It is evident that there is no intention on the part of the woman to return to and live with the Respondent and being

his wife, the Appellant, by living with and cohabiting with her, is undoubtedly committing adultery. It matter not whether he has entered into a form of marriage, according to Native Custom, with her, and paid dowry or not. The question arises, however, whether the Respondent, under the circumstances disclosed, is entitled to a second fine for adultery, or whether his proper course, when he discovered that his wife was rejecting him, and declined to have anything more to do with him, would not have been to have obtained a dissolution of her marriage by the return of her dowry in the usual way.

In the case of *Gomfi versus Mdenduluke* (3 N.A.C. 21), where the circumstances were somewhat similar to the present case the Court refused to award damages to the Plaintiff and held that it was contrary to public morality and good policy to allow the husband to make his wife's continued immorality a cause for gain.

Following this ruling the appeal is allowed with costs and the Magistrate's judgment altered to judgment for Defendant with costs.

1925, March 12.

Umtata.

XALISWAYO AND MBANGA *vs.* KOMANISI.

(Mqanduli Case.)

Before J. M. Young, A.C.M., President, with F. N. Doran and R. C. E. Klette as Assessors.

Adultery—When separate acts and not continuous—Damages.

In Winter, 1924 Defendant committed adultery with Plaintiff's wife. Plaintiff took action against Defendant before the headman for the recovery of damages for the adultery committed with his wife and Defendant was ordered to pay 3 head of cattle or their value £15. In September, 1924 Defendant again committed adultery with Plaintiff's wife and Plaintiff sued the Defendant before the Magistrate for further damages for three head of cattle or value £15 on the grounds of adultery.

JUDGMENT.

By President: The appeal in this case is brought on the ground that the damages awarded are excessive and that the Magistrate should have regarded the acts of adultery complained of as one continuous act and given judgment for three head of cattle only.

It is clear from the evidence that notwithstanding the fact that the Plaintiff complained and was awarded damages by the headman for the first act of adultery, he was again caught in adultery with the Plaintiff's wife.

Under these circumstances the Magistrate correctly treated the two acts as separate and distinct.

The appeal is dismissed with costs.

1923, November 22.

Butterworth.

XOXO *vs.* SITWAYI.

(Kentani Case.)

Before J. M. Young, A.C.M., President, with R. D. H. Barry
and R. J. MacLeod as Assessors.

*Adultery—Evidence—Woman's word as to the parentage of
her child and evidence aliunde of continued intimacy held
sufficient to prove adultery.*

The facts of the case are immaterial.

JUDGMENT.

By President: In this case there is present one of the important elements in adultery cases, namely, the pregnancy. The Plaintiff's wife is emphatic that the Defendant was responsible for her condition and she is the person in the best position to determine the parentage of her child.

Her evidence is not unsupported and there is evidence *aliunde* of intimacy since the year 1918.

Although the evidence is not strong yet there is sufficient on the record to support the judgment in the Court below. The appeal is dismissed with costs.

1923, December 13.

Lusikisiki.

SOBIJASE *vs.* BHEBA.

(Bizana Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson
and J. W. Mitchell as Assessors.

*Damages—Claim for damages for adultery not necessarily
barred by tender of return of dowry cattle.*

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The case of Mendziwa *versus* Lubalule (3 N.A.C. 170) relied upon for the Appellant is not in this Court's opinion in point. In that case the woman refused to live with her husband and the dowry was tendered on three occasions. In the present case the Magistrate found that the wife had left her husband's kraal during his absence at the Mines and was living with the defendant and that the tender to return the dowry was made subsequent thereto. In these circumstances the Court is of opinion that the tender does not absolve the Defendant from liability to pay the usual damages.

The presumption that the Defendant and the Plaintiff's wife who were living together as man and wife, committed adultery has not been rebutted. The appeal is dismissed with costs.

1924, March 3.

Umtata.

MPANGALALA AND MRAZULI *vs.* NJIJWA.
(Mqanduli Case.)

Before W. T. Welsh, C.M., President, with P. G. Armstrong
and E. W. Bowen as Assessors.

Adultery—Marriage of woman against her consent—Woman held not to be the wife of Plaintiff—Section 29 Proclamation No. 140 of 1885—No damages claimable.

The facts of the case are not material.

JUDGMENT.

By President: In this case the Plaintiff, now Respondent, sued the Defendant, now Appellant, for damages for adultery with his wife Nodamile. The main ground of defence was that the Plaintiff was not married to Nodamile owing to want of consent on her part.

The Magistrate found that there was consent and gave judgment in favour of the Plaintiff. Against this decision the Defendant has appealed.

It is clear from the evidence that (1) Nodamile was beaten by her father before being sent to the Plaintiff to be his wife. The Magistrate found this to be the case. (2) Her father admitted that he had married his daughter to the Plaintiff against her wish. (3) Nodamile, shortly after being left by the duli with the Plaintiff fled and lodged a complaint at the Magistrate's Office. Her conduct throughout is consistent with her contention that she was being forced into a marriage to which she was opposed.

Section 29 of Proclamation No. 140 of 1885 lays down that it shall not be lawful for any person to compel any woman to enter into a contract of marriage or to marry against her wish.

This Court is satisfied that the woman did not at any time consent to marry the Plaintiff and was therefore not his wife. The appeal will be allowed with costs and the judgment altered to one for the Defendant with costs.

1924, March 3.

Umtata.

MTI *vs.* NKAMBI.
(Mqanduli Case.)

Before W. T. Welsh, C.M., President, with P. G. Armstrong
and E. W. Bowen as Assessors.

Adultery—Evidence—Wife and go-between are not accomplices whose evidence necessarily requires corroboration.

The facts of the case are immaterial.

JUDGMENT.

By President: There is nothing to show that the Magistrate discredited the evidence of the Plaintiff's wife or Maliwa. This Court is not aware of any decision in which it has been

ruled that the evidence, in adultery cases, of either the wife or the go-between requires corroboration on the ground that they are accomplices and is of opinion that the Magistrate erred in holding that such is the case.

The conduct of Maliwa in accepting "Nyoba" is not inconsistent with native practice in such matters. In the circumstances it is difficult to see how the husband could make a catch and in any case his wife did commit adultery. This Court is accordingly of opinion that the Plaintiff should have succeeded.

The appeal will be allowed with costs and judgment altered to one for the Plaintiff as prayed.

1924, March 10.

Butterworth.

DZIMA *vs.* LUWANA.
(Kentani Case.)

Before W. T. Welsh, C.M., President, with R. D. H. Barry and W. F. C. Trollip as Assessors.

Adultery—Evidence—Custom—Daughter frequently acts as go-between for her own or step-mother—Two Messengers are usually sent to claim adultery damages but one is sufficient.

The facts of the case are not material.

JUDGMENT.

By President: The Native Assessors having been consulted state unanimously that there is nothing whatever unusual and in fact it is quite a common practice for a grown up daughter to act as go-between between the adulterer and her own or her step-mother. They also state that though two messengers are usually sent to demand damages one is sufficient. The Magistrate has believed these two witnesses who support the Plaintiff and his wife and as their conduct is consistent with Native Custom as stated by the Native Assessors this Court is not prepared to disturb the Magistrate's finding.

The appeal is dismissed with costs.

1925, April 2.

Kokstad.

ZATU *vs.* MJANYELWA.
(Mount Frere Case.)

Before W. T. Welsh, C.M., President, with F. E. H. Guthrie and H. E. Grant as Assessors.

Adultery—Ntlonze—Right of brother of husband to take and detain ntlonze.

Mjanyelwa "caught" Zatu in adultery with his (Mjanyelwa's) brother's wife and took certain articles as "ntlonze" which he declined to return until a guarantee was given for their production at the trial of the case. Zatu sued Mjanyelwa for their return and the Magistrate found in favour of the

latter. Zatu appealed on the ground that the defence that the articles were taken as "ntlonze" can only be raised by the husband of the guilty woman and then only if he had instituted an action for damages for adultery.

JUDGMENT.

By President: In the opinion of this Court the Defendant was justified in the circumstances disclosed, in taking "ntlonze" from the Plaintiff whom he alleges he found in adultery with the wife of his (the Defendant's) brother, and in their detention for a reasonable and limited period.

The appeal is dismissed with costs.

1925, July 7.

Umtata.

HAGILE *vs.* MEHLWANA.

(Engcobo Case.)

Before J. M. Young, A.C.M., President, with E. G. Lonsdale and G. M. B. Whitfield as Assessors.

Native Custom—Wife returns to father's kraal—Marriage not dissolved—Commits adultery—Adulterer pays cattle to father as dowry—Husband entitled to demand damages for adultery out of second dowry received, from father.

The facts of the case are sufficiently clear from the Judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellant sued Respondent in the Magistrate's Court for (1) Eight head of cattle or £60 their value, paid by one Filiva Sicwayi to Respondent as dowry for Nokayilote while she was still the wife of the Appellant; (2) the restoration of his wife Nokayilote or the return of her dowry, namely eight head of cattle or their value £60.

It is common cause that Appellant married Nokayilote by Native Custom and paid eight head of cattle as dowry for her, that she left Appellant and that, while she was at the Respondent's kraal eight head of cattle were paid by Filiva Sicwayi to Respondent. The Appellant states that after his wife left him, acting on information received, he and others went to Filiva's kraal at night, and found his wife Nokayilote in a hut with Filiva. The Magistrate has found this to be a fact because in his reasons for judgment he states that there is abundant proof that Appellant's wife and Filiva were found in circumstances indicating the commission of an act of adultery. This being the case the Appellant should have been awarded some of the cattle paid as dowry by Filiva.

The question as to how many of the cattle paid by Filiva to Respondent should have been awarded to Appellant having been put to the Native Assessors they state:—

“The Appellant is in the position of a man who has found his wife in adultery because the dowry paid by him has not been returned. The Respondent has not acted in accordance with custom. He has received two dowries for one woman, and before he received a second dowry he should have had the marriage between the Appellant and Nokayilote dissolved. Appellant is entitled to three head of cattle as no child has been born as a result of the adultery.”

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Plaintiff for

- (1) Three head of cattle or their value £15;
- (2) Four head of cattle or their value £30;
- (3) Costs of suit.

1927, December 5.

Lusikisiki.

SICEFE *vs.* NYAWOZAKE.

(Tabankulu Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and W. C. H. B. Garner as Assessors.

Dowry—Re-marriage of woman during subsisting marriage—Husband entitled to claim such number of cattle received by woman's father in respect of the second dowry as would correspond to a claim for damages—Man paying second dowry entitled to claim from woman's father reimbursement of the cattle paid by him as dowry provided he was unaware of the previous marriage.

Plaintiff, Nyawozake, married Marabe, daughter of Defendant, Sicefe, some 6 or 7 years ago and paid 5 head of cattle for her. Sicefe has now given the said Marabe, Plaintiff's wife, in marriage to one Gebedwana and has received 4 head of cattle for her. Plaintiff brings an action wherein he claims delivery of the aforesaid 4 head of cattle or their value £20. The Magistrate entered judgment for the Plaintiff in terms of his claim. The Defendant appealed.

JUDGMENT.

By President: The Native Assessors having been consulted state that when a second dowry is received by the father of a married woman for such woman her husband is entitled to claim these in such number as would correspond to a claim for damages and that the man paying the second dowry

can make a claim on the woman's father to be reimbursed the cattle he had paid for her provided he was not aware of the previous marriage.

This expression of opinion is consistent with the decision in the case of Dolomba Matshiki *versus* Mpahleni Klass (4 N.A.C. 62).

The Appeal is dismissed with costs.

1925, December 4.

Kokstad.

MAKWANGINI *vs.* NTENTEMA.

(Mount Frere Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and F. E. G. Munscheid as Assessors.

Adultery—Sufficiency or otherwise of evidence.

The facts of the case are not material.

JUDGMENT.

By President: It was decided in the case of Poselo *versus* Mtangayi (1 N.A.C. 163) and numerous subsequent decisions that when any of the essential elements necessary to establish a charge of adultery are absent the most convincing evidence is required. One of these elements is the wife's admission. In the present case the Plaintiff's wife denies the allegations. It appears that she was at the time living at Mpotywa's kraal having been away from her husband for some years. The alleged catch was made by Job Ngaleka, who says that he was accompanied by three men, one of whom, Nkuni, is head of the kraal where the catch is said to have been made and yet none of them is called to support Job. The Defendant is also said to have made certain admissions before the headman, in the presence of other men, not one of whom gives evidence. It seems unlikely that the Defendant would, after ignoring two messages to go to the headman in connection with his blanket, go and claim it. It is not explained why Defendant was not taken to Mpotywa at whose kraal the woman was then living when he was caught with her in the circumstances alleged.

In the present case not only is there no admission by the woman, but she positively asserts that she did not commit adultery with the Defendant.

In these circumstances and in view of the omission to call material available evidence this Court is of opinion that the Plaintiff has not established a case that is clear beyond any reasonable doubt.

The Magistrate's reasons are somewhat meagre and are not of material assistance to the Court.

The appeal will accordingly be allowed with costs and judgment in the Court below altered to one of absolution from the instance with costs.



1923, July 16.

Umtata.

NDUMNDUM *vs.* MHLAKAZA.

(Tsolo Case.)

Before J. M. Young, A.C.M., President, with O. M. Blake-way and P. G. Armstrong as Assessors.

Discretion of Magistrate to apply Colonial Law or Native Law.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Respondent went away to work and left his wife and one child at his kraal in the Tsolo District. Shortly after he left, his wife, without the knowledge or consent of Respondent or his relatives went to her father's, the Appellant's kraal, taking the child and all the Respondent's property with her. Whilst at Appellant's kraal she gave birth to another child. After living for about three years with her father the woman died. During his absence Respondent wrote to his wife requesting her to return to his kraal and his father appears to have attempted to get the children back. Respondent on his return in April, 1920, went to Appellant and asked for his children. Appellant refused to give them up and demanded four head of cattle as maintenance. Appellant in his plea contended that he was entitled to retain the children until three head of cattle as "Isondlo" had been paid.

After the pleadings had been closed it transpired that the Respondent and his wife were married according to Christian rites. The Court thereupon decided to deal with the case under Colonial law. Appellant's attorney then applied to be allowed to claim £50 for maintenance in view of his previous claim of three head of cattle having been based on Native Law and the Court's ruling that Native Law does not apply. This application was refused. After hearing the evidence the Magistrate entered judgment for Plaintiff for the restoration of the children and costs of suit.

Against this judgment an appeal has been brought on the following grounds:—

- (1) That the Magistrate erred in ruling that the case should be tried under Colonial Law owing to the fact that Plaintiff had married by Christian rites. That such fact should only affect questions between husband and wife and not the husband and third parties.
- (2) That even if the case should be tried under Colonial Law it would not be necessary for the Defendant to rely upon a specific agreement for the payment of maintenance, in view of the native custom of "Isondlo" which has not been abrogated by law.

By Section 3 of Proclamation No. 112 of 1879 it is intended that civil suits shall ordinarily be dealt with according to the law in force at the time in the Cape Colony

but where the parties to the suit are both natives the Magistrate has discretion to deal with the case according to Native custom.

In the present case, the Respondent and his wife having been married according to Christian rites, this Court is of opinion that the Magistrate has not made an improper use of the judicial discretion vested in him in deciding to try the case under Colonial Law.

The Magistrate having decided that the case should be dealt with under Colonial Law no claim under the Native Custom of "Isondlo" could be considered.

In view of the decision in the case of Bell *versus* Hendrik (C.P.D. 1920, 214), in which it was held that in the absence of a definite contract to pay for maintenance the children could not be detained against the wish of the father, the Magistrate correctly ordered the Appellant to return the children to the Respondent.

The Appeal is dismissed with costs.

1923, November 7.

Umtata.

MNINTSHANA *vs.* NGQINGILI.

(Tsolo Case.)

Before J. M. Young, A.C.M., President, with H. E. F. White and F. N. Doran as Assessors.

Conflict of Native and Colonial laws—Claim by party married by Christian rites for a child, the result of his adulterous intercourse, not supported by Court.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

By President: The Plaintiff, now Appellant, during the subsistence of a marriage by Christian rites, seduced a woman named Mesina and as a result of this seduction a male child was born. This child is now three years of age.

It is common cause that five head of cattle were paid as damages by Appellant to Respondent for the seduction and pregnancy of Mesina.

Appellant claims that, having paid these five cattle, he is entitled under Native Custom to have the custody of the child. Respondent contends that the child is too young to be removed from the custody of his mother and says that he is ready and willing to hand him over when he reaches a suitable age and upon payment of the usual maintenance beast. He also claims an elopement beast. This claim, however, was abandoned.

The Magistrate entered a judgment of Absolution from the instance with costs and furnished the following reasons:—

"The Plaintiff in this case is a man married according to Christian rites and in the opinion of this Court has no right whatsoever to lean on heathen custom in a matter such as the one before the Court. This surely is the type of man

who would like a law unto himself. His behaviour is an outrage upon the form of marriage to which he submitted. If any mistake were made in giving an absolution judgment, the Plaintiff has suffered no disadvantage. The Court has in mind the saving of costs, as it found that the infant was well cared for by its mother. The disability arising from the age of the child, or the mother becoming an undesirable guardian, might, later on, if civilized law could not be applied, give the Plaintiff some claim to its custody.

The Defendant was represented by a legal practitioner, who did not ask for final judgment and surrendered the claim in reconvention.

It is submitted that even under native custom the Courts would not order the delivery of a child so young that, in the ordinary course of events, its own mother is the one person in whose care it is most desirable to leave it."

In the opinion of this Court the Appellant, having married according to Christian rites, has no claim to the child born of his adulterous intercourse with the woman Mesina. His relations with her are a breach of the solemn marriage contract entered into by him and the Native Custom cannot apply. The Appeal is dismissed with costs.

1924, March 4.

Umtata.

QUVILE *vs.* DOLDAM & TAFENI.

(Qunubu Case.)

Before W. T. Welsh, C.M., President, with P. G. Armstrong and R. H. Wilson as Assessors.

Custom—First husband is the owner of the children born of a woman's second "marriage" when such marriage takes place without the first marriage having been dissolved.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Native Assessors having been consulted state unanimously that if a woman being the wife of a man "marries" another without her previous marriage having been dissolved and has children by the second man, these are the children of the husband even though she may have lived with the second man for many years without the former claiming her.

This opinion is consistent with the more recent decisions of this Court and the Court accepts it as being a correct statement of Native Custom.

The marriage of Ngqeleni not having been dissolved the children born to his wife Mabukwana by Nkunzemfene must be regarded as the children of the former. •

The appeal will be allowed with costs and the judgment altered to one for the Defendant with costs.

1924, March 5.

Umtata.

QOBA *vs.* DASI.

(Qumbu Case.)

Before W. T. Welsh, C.M., President, with P. G. Armstrong
and R. H. Wilson as Assessors.

Custom—Children of a widow are born to her deceased husband unless dowry paid by him has been returned to his heir.

Plaintiff, heir of the late Sobonkolo, alleged that Sobonkolo married Defendant's sister Kulukazi according to Native Custom and paid dowry to Hewukile, Defendant's late father, about 30 years ago;

That Kulukazi, after her husband's death, returned to her people where she gave birth to certain two children, named Maliwashe and Julia;

That Julia was married with Plaintiff's consent and Maliwashe without it, and that Defendant became possessed of the dowry paid in respect of both marriages, and refuses to hand them over to Plaintiff, who is lawfully entitled to them.

Defendant denied the marriage to Kulukazi and stated that a fine was paid by Sobonkolo in respect of her seduction by him, and admitted that the two children, Maliwashe and Julia, were born of Kulukazi at his, Defendant's, kraal of whom Sobonkolo was not the father. He further admitted that he was holding certain dowry cattle paid in respect of the marriages of the two girls, but denied that Plaintiff was entitled thereto.

It was subsequently admitted at the hearing of the case that Sobonkolo married Kulukazi.

The Magistrate found proved that the girls were born to the widow of Plaintiff's late brother: Maliwashe at the kraal of the late husband and Julia at the kraal of the woman's father, whose heir Defendant is. He also found proved that Maliwashe was twice married and that she deserted her first husband, and Defendant in returning her dowry cattle used the second dowry to replace the first.

JUDGMENT.

By President: Though there are divergences the broad principle of Native Custom is that the children of a widow are born to her deceased husband unless the dowry paid by him has been returned to his heir.

In the case of *Sogoboza versus Finini* (3 N.A.C. III), it was decided that this principle is applicable to the District of Qumbu. No cause has been shown for dealing with the case under Pondo Custom.

In regard to the Cross Appeal, as the dowry received from Xego was utilized to refund the dowry paid by Malwabi and this was done on account of the Plaintiff, this Court is of opinion that the latter is not entitled to succeed in his claim therefor.

The Appeal in respect of Julia's dowry will be allowed with costs and the judgment altered to one for the Plaintiff for six cattle or their value at £5 each less two cattle or £10 tendered as Isondlo.

The Cross Appeal will also be allowed with costs and the judgment in respect of Maliwashe's dowry altered to one for the Defendant with costs.

1924, July 8.

Butterworth.

SKEYI vs. XELITOLE.
(Willowvale Case.)

Before J. M. Young, A.C.M., President, with R. D. H. Barry and R. J. Macleod as Assessors.

*Custom—Legitimization by marriage of child by "dikazi"—
Fine—"Isondlo."*

The facts are sufficiently clear from the Judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Respondent sued the Appellant in the Magistrate's Court for five head of cattle or their value £25—the dowry of a girl named Nongezi.

It is common cause that the Respondent married the Appellant's sister subsequent to the dissolution of her previous marriage and that the girl Nongezi was born as the result of illicit intercourse between Respondent and Appellant's sister.

The Respondent alleges that he paid two head of cattle on account of dowry and one beast as a fine for causing the pregnancy of Nongezi's mother and that Nongezi then became his property.

The Appellant has given Nongezi in marriage and received five head of cattle as dowry for her and the claim is in respect of these cattle.

During the course of the hearing in the Magistrate's Court the Respondent's Attorney abandoned his contention that a fine has been paid for the pregnancy of Nongezi's mother and asked the Court to rule that the subsequent marriage of Nongezi's parents legitimized her.

In his plea the Appellant admits that three cattle were paid as dowry but contends that as Nongezi was born at his kraal after the dissolution of his sister's first marriage and before she entered into her second marriage with Respondent the child Nongezi is his property and therefore he is entitled to her dowry and not the Respondent.

The Magistrate entered judgment for Respondent for five head of cattle or their value £25 less one beast as a fine and one as "Isondlo." In his reasons for judgment he states that following the decisions in the cases of *Ovolo versus Tshemese* and *Nyete Kolopeni versus Setini Ngokumana* (3 N.A.C. 121) he found that the girl Nongezi belonged to the Respondent and that his failure to pay a fine at the time does not vitiate his claim to her. He also found that Respondent had agreed to pay a fine.

The appeal is brought on the ground that the judgment is contrary to Native Law and Custom in view of the Respondent's failure to prove his alleged special agreement of the payment of a beast as a fine which he stated entitled him to ownership of the girl whose dowry he claimed in the summons.

At the request of the Appellant's Attorney the case is submitted to the Native Assessors, who state that when a marriage is dissolved by the restoration of the dowry paid for her the woman becomes a "dikazi" and if she is made pregnant and the man who is the cause of her pregnancy marries her subsequent to the birth of the child, the child belongs to the natural father and that in order to assert his right to the child it is not necessary for him to pay any fine. If the child is left with its mother's people and brought up there the father is liable for "isondlo" only and the number of the cattle payable may be varied according to the length of time the child was maintained.

This expression of opinion in effect is consistent with previous rulings of this Court.

The Appellant's Attorney contends that inasmuch as the special agreement on the part of the Respondent to pay a fine has not been fulfilled by him such breach of contract is sufficient ground for the overriding of the Custom and the withholding of the girl's dowry.

With this view this Court cannot agree as, in its opinion, it would have the effect of illegitimizing a child which is automatically legitimized by marriage and the payment of dowry.

In the case of *M. Masheme versus Scott Nelani* (4 N.A.C. 43), it was held that the payment of dowry subsequent to the birth of a child legitimizes the child which then becomes the property of the father and that this is in accordance with the principle of South African Law and that Native Law should as far as possible be assimilated to South African Law except in purely Native Institutions.

The Appeal is dismissed with costs.

1924, September 2.

Kokstad.

MOLEFI *vs.* KHABO.
(Matatiele case.)

Before W. T. Welsh, C.M., President, with W. G. Wright
and G. M. B. Whitfield as Assessors.

*Basuto Custom—Rights of illegitimate grandson—Conflict
of custom.*

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff (now Respondent) claims to be the heir according to Basuto custom of his grandfather, Ralinonyana Malute. It appears that Ralinonyana had one son, Stokwe, and three daughters. The son predeceased him leaving one daughter but no male issue. The eldest of the three daughters has an illegitimate son, Khabo, the Plaintiff. The late Ralinonyana has, so far as can be ascertained, no other relatives. To the Plaintiff's claim upon the Defendant, now Appellant, for the delivery of certain cattle, the latter, who is married to Ralinonyana's second daughter, denies that the Plaintiff is heir and puts forward the claim that Modiehi, the daughter of Stokwe, the deceased son, is heiress.

Certain evidence was led as to the appointment of Khabo by Ralinonyana as his heir, but as the claim is founded solely upon custom it is not necessary to consider that aspect of the case.

The issues involved having been put to the Native Assessors, Kwalikwalu (Xesibe), W. Jozane (Hlangwini) and Maposi (Baca) state that according to their respective customs Modiehi, Stokwe's daughter, is heiress to the late Ralinonyana. The two Basuto Assessors, Mohatla Nkai and K. Lebenya, state that according to Basuto custom, Khabo, the illegitimate son of Ralinonyana's eldest daughter, is his heir.

This statement of opinion is consistent with the view taken by the Court in the case of Mangqalaza *versus* Mangqalaza (1 N.A.C. 82), which was a case from a Court in Fingoland.

The parties in this case being Basutos residing in a Basuto location, this Court will apply Basuto custom.

On the merits of the case this Court is not prepared to interfere with the Magistrate's findings and the Plaintiff being heir the appeal will be dismissed with costs.

1924, December 12.

Lusikisiki.

MKUBA *vs.* SIRUZULA.

(Bizana case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson
and W. H. C. Garner as Assessors.

*Allotment—Married daughter—Second daughter of fourth
house cannot be allotted to Great House.*

The facts are sufficiently clear from the judgment of the
Native Appeal Court.

JUDGMENT.

By President: The Plaintiff claimed five cattle from the defendant, apparently, though the summons is vague, on the ground that they were the dowry of one Nomafa, the second daughter of the fourth house of his grandfather, Mbabi. The Defendant, who is son and heir in Mbabi's fourth house, contests this claim. The Plaintiff bases his claim on the ground that the girl Nomafa was allotted by late Mbabi to his first house, to which he is heir. The Magistrate did not believe that Mbabi made such an allotment as that alleged as such would be contrary to Native law. It is admitted that at the time the allotment is said to have been made by Mbabi that Nomafa was a married woman with children and that her dowry had already been paid.

The matter having been submitted to the Native Assessors they state unanimously that it is contrary to custom to allot a married daughter who has had children and that in any case the second daughter of the fourth house cannot be allotted to the Great House.

In view of these statements of Native custom this Court is of opinion that the Magistrate, who is an experienced officer with an intimate knowledge of the customs in Eastern Pondo-land, was correct in his finding that no such allotment as alleged had been made.

The appeal is dismissed with costs.

1926, April 6.

Lusikisiki.

MLUNGUZA vs. LANGA and MAGCUDA.

(Tabankulu case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson
and W. C. H. B. Garner as Assessors.

Pondo Custom—Cattle donated by late father to minor son
not executable for elder brother's (kraalhead's) debts.

Practice—Cases consolidated for hearing—Notice of appeal
to be given in each case.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: It appears that certain cattle were donated by the late Hlomi to his minor son, Langa Hlomi. The progeny of these cattle have been attached at the instance of Thomas Mlunguza, who has obtained a judgment against the elder brother and present guardian of the minor Langa Hlomi. The Magistrate declared the cattle not to be executable. The matter having been placed before the Native Assessors they state unanimously that according to Pondo Custom as the cattle were donated to the minor by his late father they are his property and are not liable to seizure on a judgment against his elder brother, now the head of the kraal at which he resides. The appeal is dismissed with costs.

Note: In regard to the noting of appeals where two cases are heard together the notice of the Appellant's Attorney is invited to the case of Goosen & Ors *versus* McCullagh (1923 E.D. L 344).

1926, March 9.

Umtata.

MAGWALA vs. MBO.

(Engcobo case.)

Before J. M. Young, A.C.M., President, with H. E. F.
White and R. C. E. Klette as Assessors.

Adultery—Adulterine child born does not belong to natural father if he subsequently marries the mother—Native Assessors' opinion.

The facts are stated in the judgment.

JUDGMENT.

By President: The facts in this case are as follows:—

- (1) A Native named Mjikilala married Nolam according to Native Custom and paid nine head of cattle as dowry for her.
- (2) That during the subsistence of this marriage, Appellant committed adultery with Nolam and, as a result of this intercourse, a girl, Mkamtutuzeli, was born.

- (3) That subsequent to the birth of this child the marriage between Mjikilala and Nolam was dissolved by the restoration of all the cattle paid as dowry.
- (4) That after the dissolution of the marriage Appellant married Nolam and paid eight head of cattle as dowry for her.

The Respondent, who is the son of the marriage of Nolam and Mjikilala was sued by Appellant for a declaration of rights in the girl Mkamtutuzeli.

Appellant contends that as he is the natural father of Mkamtutuzeli and as he has married her mother and paid dowry, he is entitled to be declared her guardian and to have her custody. He says that he paid eight head of cattle because he desired to get possession of the child.

The matter having been put to the Native Assessors, they state: "The whole of the dowry paid for Nolam having been restored all the children born of the marriage between her and Mjikilala belong to her people, and that Mkamtutuzeli having been born as the result of adulterous intercourse between Appellant and Nolam, Appellant has no claim to her whether he paid extra dowry as alleged or not."

In view of this statement of custom, the appeal is dismissed with costs.

1926, November 18.

Umtata.

LUIDIDI vs. MSIKELWA.

(Qunubu Case.)

Before J. M. Young, Ag. C.M., President, with H. E. F. White and G. M. B. Whitfield as Assessors.

Inheritance—Adulterine child, in default of legitimate issue, can succeed to his mother's husband's estate even where the putative father was sued for adultery damages—Payment of damages does not amount to repudiation.

Plaintiff sued Defendant for nine head of cattle or their value £45 and alleges that he is the son and heir of late Gongqwana, who was brother and heir of late Nyanga and that he is therefore heir to the late Nyanga; that the late Nyanga had a daughter Nomqame who had married and for whom six head of cattle were paid as dowry; that these cattle have now increased to nine head and that they are in possession of the Defendant.

By the defence it is submitted that one Mpetshwa, an illegitimate son of Madaweti, wife of the late Nyanga, is the heir.

During the late Nyanga's absence at work one Qoboka rendered Madaweti pregnant and she gave birth to Mpetshwa. On his return from work Nyanga sued Qoboka for damages and was awarded two head of cattle and costs.

The Magistrate found that Mpetshwa remained at Nyanga's kraal, who, beyond suing Qoboka for damages, took no other action openly to repudiate Mpetshwa. Nyanga, after the action against Qoboka concluded, again left for the mines where he died.

JUDGMENT.

By President: The circumstances of this case having been put to the Native Assessors they state that, in default of legitimate issue, an adulterine son can succeed to his mother's husband's estate, unless he has been publicly repudiated and driven away from the kraal. They state further that the fact that his father was sued for damages for the adultery which resulted in his birth does not amount to repudiation and does not affect his status.

This expression of opinion is in conformity with recent decisions of this Court.

The appeal is dismissed with costs.

Note: The following dissenting judgment was delivered by G. M. B. Whitfield, Esquire, Magistrate, Xalanga:—

The question for decision in this appeal is whether an adulterine son of a Native wife, married according to Native customary forms, is entitled to succeed to the intestate estate of his mother's husband, to the exclusion of a legitimate son of such husband's brother, such husband having obtained damages in the Court of the Magistrate of Qumbu in 1908 against one Qoboka for adultery with his wife resulting in the procreation of Respondent.

I desire to express my dissension against the judgment of the President of this Court in this case in which it was held "that in default of legitimate issue, an adulterine son can succeed to his mother's husband's estate, unless he has been publicly repudiated and driven away from the kraal . . . and the fact that his father was sued for damages for the adultery which resulted in his birth does not amount to repudiation and does not affect his status," on the following grounds, viz.:—

- (1) That the successful action for damages for adultery against Qoboka, the natural father of Respondent, was sufficient repudiation in law to declare to the world his (Respondent's) illegitimacy. This contention is supported by the decisions of this Court in *Sidnbulekana versus Fuba* (1, N.A.C. 49), *Baatje versus Mtuyedwa* (1, N.A.C. 110) and *Mafingeni versus Tafeni* (3, N.A.C. 117) and by *Maasdorp's Institutes of Cape Law* (3rd edition, vol. 1, page 9).
- (2) That the judgment is inconsistent with the policy of this Court and relative legislature, the object of which is the gradual bringing into uniformity of conflicting local Native customs, and, so far as may be, the ultimate assimilation of Native Law and Custom with the ordinary (statute and common) law of this Union. It is submitted that the adoption of a local Fingo Custom, which enables an adulterine son of a wife to succeed *ab intestato* to his mother's husband's estate (a matriarchal system of succession) in preference to the patrilineal system of succession practised by the majority of Native tribes in these Territories, is a departure from the policy of obtaining uniformity. It is also thought that the opportunity should have been taken to abrogate this

abhorrent custom, by laying it down that the common law of this Union must prevail in such cases.

In this connection attention is directed to paragraph No. 107 of the Report of the Commission on Native Laws and Customs, 1883, to paragraph No. 233 of the Report of the South African Native Affairs Commission, 1903-1905, to Sections 3, 5 (1), and 6 (2) of Proclamation No. 142 of 1910, to Section No. 104 (1) of Proclamation No. 145 of 1923, and to the general trend in this direction (uniformity and assimilation) of the recent decisions of this Court notably in the case of *Mark Nkomentaba versus Office Mtimde*, heard at Kokstad in April, 1925.*

- (3) That the judgment is not based on good Native custom obtaining generally amongst the Native tribes of South Africa in as much as the Native system of inheritance in South Africa is that of primogeniture and with patrilineal descent a governing principle. In this case the claim to succession is based on what is apparently a matrilineal system which does not obtain in South Africa.
- (4) That in as much as Native Law and Custom is only applicable in these Territories in cases where it is not opposed to public policy, public order, morality, and equity and justice, a claim, which in any of these respects, is inconsistent with the common or statute law of this Union cannot be entertained. This rule was applied in the following cases, viz.:—*Ncotama versus Ncume* (10, E.D.C. 207 at page 209); *Ngqobela versus Sihele* (10, E.D.C. 346 at page 353); *Nbono versus Manoxoweni* (6, E.D.C. 62 at pages 66, 70 and 73); *Mqolora versus Jim Meslani* (1, N.A.C. 97), and *Nolanti versus Sintenteni* (1, N.A.C. 43 at page 44).

The Courts in these Territories administer the common and statute law of the Union, but they have the discretion to apply Native Law and Custom under certain circumstances, but within such limits as the common and statute law of the Union permits. *Nbono versus Manoxoweni* (6, E.D.C. 62 at page 73).

The Court must refuse to recognize principles of Native Law totally abhorrent to the principles of the common and statute law of this Union. *Nbono versus Manoxoweni* (6, E.D.C. 62 at page 66).

This Court has refused to apply Native Custom which is repugnant to justice and equity, *Nolanti versus Sintenteni* (1, N.A.C. 43), or which is in conflict with the law in force in these Territories and contrary to good policy and public morals (1, N.A.C. 97), *Mqolora versus Jim Meslani*.

Children born *ex prohibito concubitu* cannot succeed *ab intestato* to either of their parents nor to any relations of their parents, Maasdorp's Institutes of Cape Law (3rd edition,

* Page 127 of these Reports.

vol. 1, page 115). Illegitimate children are regarded as having no father, Maasdorp's Institutes of Cape Law (3rd edition, vol. 1, page 10).

For the foregoing reasons it is considered that the appeal should have been allowed.

1927, March 1.

Umtata.

MQURUBANA *vs.* MANCITA.

(Mqanduli Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and E. G. Lonsdale as Assessors.

Seduction and pregnancy—Non-payment of damages by seducer—Subsequent marriage of girl to another man—Dissolution of such marriage—Cohabitation between seducer and girl, marriage and payment of dowry—Rights in child born of the seduction—Child not legitimized.

JUDGMENT.

By President: In this case Plaintiff, now Appellant, claims from the Respondent five head of cattle or their value £25 paid as dowry for a girl Tyotyó.

The Magistrate found that Plaintiff had seduced a girl Nobetele by whom he had a female child, the abovenamed Tyotyó. When the latter was about a year old Nobetele was given in marriage to Mbulali, who paid a dowry of three cattle. She remained with him for about a month, returned to her father's kraal for a few months and then proceeded to the Plaintiff's kraal taking Tyotyó with her. Mbulali's marriage was dissolved by the return of his dowry. All attempts to induce Nobetele to return failed, but she handed over the child to her father, giving as her reason for doing so the non-payment of any cattle on her account.

She continued to co-habit with the Plaintiff for some years who, after the death of his great wife, married her by paying a dowry of three cattle, the child however continued to remain with its maternal grandfather. This marriage was also dissolved and shortly after its dissolution Tyotyó was given in marriage by the Respondent, when the dowry now claimed was paid.

The circumstances of the case having been put to the Native Assessors they state that according to custom the Appellant has no claim to the dowry of his natural child as neither fine was paid nor marriage offered within a reasonable time. They state further that the payment of a dowry of only three cattle, in the absence of specific agreement, is wholly insufficient and that at least five cattle should have been paid to entitle the Plaintiff to claim possession of the child.

The circumstances of the case are somewhat unusual and the Court accepts the opinion of the Native Assessors, which is not inconsistent with previous decisions.

In the opinion of this Court the Appellant is not, according to Native custom, entitled to Tyotyó's dowry and the appeal is accordingly dismissed with costs.

Ref. to 1927 (T&N) 31.

1923, November 7.

Umtata.

RAMSANYANA AND SIPOKOLO *vs.* MCAPUKISO.

(Qumbu Case.)

Before J. M. Young, A.C.M., President, with H. E. F. White and F. N. Doran as Assessors.

Plaintiff sued Defendants for £50 damages for assault and alleged that they struck him upon the head and divers parts of the body and fractured a bone in his forearm and splintered a bone in his left leg.

Judgment was entered for Plaintiff as prayed.

JUDGMENT.

By President: This appeal is brought on the ground that the amount of damages awarded is excessive.

According to medical evidence the Respondent, although badly assaulted, has suffered no permanent injury, and there can be no doubt that damages have been awarded on a very liberal scale. The question is whether the amount is so unreasonable or so excessive that this Court as a Court of Appeal should interfere. Whilst this Court is at all times reluctant to set aside the judgment of the Magistrate in cases of this nature it has come to the conclusion that the amount awarded is unreasonable, and excessive and is of opinion that the Respondent will be amply compensated by a sum of £20.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Plaintiff for £20 and costs of suit.

1926, August 18.

Kokstad.

MATATIELE *vs.* SITULANE.

(Matatiele Case.)

Before J. M. Young, Ag. C.M., President, with W. G. Wright and R. D. H. Barry as Assessors.

Negligence—Tethering stallion on location commonage—Allowing "horsey" mare to graze on location commonage—Damages.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Respondent, Plaintiff in the Magistrate's Court, sued the Appellant in an action in which she claimed the sum of £10 as damages. The basis of her claim is twofold. Firstly, that Appellant took possession of a mare her property, and wrongfully and unlawfully detained it for two days, and secondly that it was the intention to have her mare served by Mr. Southey's stallion, but it was served by Appellant's stallion, and as a result of this cover, she was prevented from carrying out her intention.

The Magistrate found in her favour on the second cause of action and awarded her £2 as damages, but, on the first, he found that Appellant had detained the mare, but not continuously, and not for such length of time as to cause damage.

Against the latter part of this finding there is no appeal, the appeal being confined to the award on the first point.

In support of his judgment, the Magistrate in his reasons states that the parties being resident in a native location, the Respondent had a right to graze her mare on the commonage, but the Appellant, not having obtained a permit under the Pound Regulations, had acted unlawfully in permitting his stallion to be on the commonage, where the respondent's mare was, and that Respondent was entitled to claim the penalty provided by the Pound Regulations.

The facts disclosed by the record are that it was the practice of Appellant to stable his stallion at night, and to tether it in and about the neighbourhood of his homestead during the day, and that while it was so tethered, the Respondent's mare, which was in the condition known as "horsey," came to the stallion, which broke its tether and covered the mare twice on the commonage, that prior to this the mare went to Appellant's kraal, where his stallion was stabled, and that Respondent was notified of the mare's trespass and warned to take care of it.

In the opinion of this Court, this is not a claim for the penalty prescribed by Section 39 of the Pound Regulations, but is one based on tort or negligence, and must be dealt with under the common law applicable to such cases.

In the case of the Cape Town Municipality *versus* Paine (1923 A.D. 216), negligence is defined as "the failure to observe that degree of care which a reasonable man would have used. . . . Every man has a right not to be injured in his person or property by the negligence of another and that involves a duty on each to exercise due and reasonable care."

The questions which this Court has to answer, therefore, are:—

- (1) whether the Appellant's action in tethering his stallion on the commonage, where it had no right to be, amounted to such a degree of negligence on his part as to make him liable;
- (2) whether, although there is nothing in the Pound Regulations to prevent a resident of a location from grazing a mare there, it is incumbent on the owner of such mare to take reasonable precautions to prevent a mare in the condition in which this one was from being served by stallions on the commonage; and
- (3) whether the Respondent had suffered any damage.

The first question in the opinion of this Court must be answered in the affirmative, for, although there is no evidence on record to show that the tethering rope was defective or unsuitable for its purpose, the Appellant must have known, in view of what had gone before, that it was more than likely

that the mare would return to where the stallion was, and that its natural instincts would be aroused, resulting in the mare being covered.

The second question must also be answered in the affirmative. The Respondent, knowing that her mare was "horsey," and notwithstanding the fact that she had been warned by Appellant that her mare was exciting his stallion and constituting a nuisance at his kraal, took no steps to guard against her coming in contact with the stallion and being covered by it.

With regard to the last question, there is no evidence that the mare is in foal as a result of the cover; and, in view of the evidence of Mr. Southey, who flatly contradicts her statement that she had arranged with him to have the mare served by his stallion, this Court has come to the conclusion that Respondent has failed to prove either actual or potential damages.

The appeal is allowed with costs, and the Magistrate's judgment altered to absolution from the instance with costs.

1926, December 6.

Kokstad.

NOMBONA *vs.* GQUMANI.
(Matatiele Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and H. E. Graut as Assessors.

Claim for potential damages—Subsequent claim for actual damages—Rejection of evidence tendered after closing of Plaintiff's case.

Facts: On the 6th March, 1926, Plaintiff instituted an action against Defendant for £10 damages, alleging that on or about the 13th February, 1926, seven rams, the property or in the possession of the Defendant, trespassed in Plaintiff's stock kraal and covered a number of Plaintiff's ewes.

JUDGMENT.

By President: It is clear that the Plaintiff claimed damages for lambs which might be born during mid-winter when, it is alleged, serious losses result.

When the Plaintiff closed his case on 15th June, 1926, no losses had occurred. At that stage the Defendant applied for absolution from the instance, whereupon the Magistrate reserved judgment until the 28th September.

On this date as judgment was about to be pronounced the Plaintiff tendered evidence to show that lambs had actually died as anticipated. This evidence was, in the opinion of this Court, rightly rejected. The summons claimed potential not actual damages and it was not competent for the Plaintiff after closing his case to alter the basis of his claim.

The Plaintiff having failed to prove damages the Magistrate was in the opinion of this Court justified in absolving the Defendant. It is therefore not necessary for this Court to consider the question of contributory negligence.

The appeal will be dismissed with costs.

1923, July 11.

Umtata.

APILENI *vs.* NJEKE.

(Engcobo Case.)

Before J. M. Young, A.C.M., President, with O. M. Blake-way and P. G. Armstrong as Assessors.

Desertion—Liability of father of girl ceases when the husband takes his wife to a foreign country beyond his control

Plaintiff alleged that about 12 years ago he married Nohofolo, Defendant's daughter, and that about the commencement of winter, 1921, Nohofolo deserted him and had not since returned to him. He claimed the restoration of his wife or return of his dowry. It appeared that Plaintiff took his wife to the Free State where she met another man and lived with him.

JUDGMENT.

By President: This appeal is brought on the following grounds:—

- (1) That the judgment in regard to the desertion is not only borne out by the evidence but *per contra*, the evidence discloses that the Respondent is the deserter in that he married the woman here then took her to a Province foreign to her where he cannot expect her father to follow her.
- (2) That the judgment as to the dowry and children is wrong in law as the only evidence bearing thereupon is contained in a previous record put in which cannot be used otherwise than for purposes of reference and is not evidence upon oath in the present case.

In regard to the first ground of appeal the matter is put to the Native Assessors, who state:—

“The father of a woman is not responsible for the conduct of his daughter where the husband takes her to a foreign country beyond his control.”

In view of this opinion the appeal is allowed with costs. As it is possible, however, that the Plaintiff's wife might at some future time be under the control of her father the Magistrate's judgment is altered to absolution from the instance with costs.

1923, April 4.

Kokstad.

SIGWECE *vs.* JANI.

(Mount Frere Case.)

Before J. M. Young, A.C.M., President, with F. E. H. Guthrie and F. H. Brownlee as Assessors.

Dowry of eldest daughter of the Qadi wife of the Great House replaces any cattle paid by Great House for such wife.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The parties are sons of the late Sixandu. The Appellant is the eldest son of the fifth wife and the Respondent the eldest son of the Great House. It is common cause that Sixandu was a messenger of the late Chief Makaula and that some of the cattle paid as dowry for Appellant's mother at one time belonged to Makaula.

The Appellant contends that the cattle paid as dowry for his mother were paid direct by Makaula and that they at no time were the property of his father Sixandu. The Respondent's contention is that the dowry cattle were paid by Makaula to his father as remuneration for services rendered and that they appertained to the Great House. The Magistrate accepted the Respondent's version. In the opinion of this Court he was correct in so doing. Sixandu, being a messenger of Makaula, would in the ordinary course of his employment, be paid for services and any cattle thus received would belong to the Great House.

Under Native Custom the dowry of the eldest daughter of the Qadi wife of the Great House would go to the Great House to replace any cattle paid for such wife. The appeal is dismissed with costs.

1923, July 9.

Umtata.

ZWARTLAND *vs.* STEFANUS.

(Elliot Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and P. G. Armstrong as Assessors.

Payment of dowry—Proof of registration under Section 13 of Proclamation No. 142 of 1916 no longer necessary in District of Elliot—Proclamation No. 142 of 1910 no longer in force there.

The facts of the case are not material.

JUDGMENT.

By President: The only ground of appeal pressed by the Appellant before this Court is the third, which reads "That the Plaintiff did not discharge the onus of proving the registration of the marriage and payment of dowry."

It is clear from the pleadings that the payment of four head is admitted. It is, however, contended that to enable the Plaintiff to succeed proof of registration in terms of Section 13 of Proclamation No. 142 of 1910 is required. In the opinion of this Court, Section 13 of Proclamation No. 142 of 1910 is, by virtue of Act No. 12 of 1913, no longer in force in the district of Elliot. It follows, therefore, that the dowry may be recovered without proof of registration. In any case, in view of the Defendant's admission, this Court is of opinion that proof of payment is not necessary. The appeal is accordingly dismissed with costs subsequent to 25th June, 1923.

1923, August 21.

Kokstad.

SISWENYE *vs.* SIKAKA.

(Matatiele Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and H. E. Grant as Assessors.

Liability of dowry holder, who is not the guardian of the girl, to return it to the husband.

In this case Defendant received dowry for a girl of whom he claimed to be the guardian. Subsequently one Sigweje brought an action against Defendant for the girl and an account of the dowry paid for her, claiming to be her guardian, and judgment was entered for an account of the dowry paid and for payment of such dowry. This judgment was not satisfied. Thereafter the husband, the present Plaintiff, sued Defendant for the return of the dowry paid him.

JUDGMENT.

By President: The circumstances having been placed fully before the Native Assessors, they state that, according to custom, the Defendant, not having paid over the dowry to the guardian of the girl, is responsible for its return to the Plaintiff, now Respondent.

This opinion agrees with the decision on the case of Ntantiso Jonas *versus* Ngwadla Vulangengqele (4 N.A.C., 96) heard at Umtata on 26th July, 1919, and previous rulings.

The appeal will be dismissed with costs.

1923, August 22.

Kokstad.

MZOZOIYANA *vs.* PIENAAR.

(Mount Fletcher Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright
and H. E. Grant as Assessors.

*Native custom—Custody of dowry cattle in absence of woman's
guardian.*

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff, now Appellant, claimed against Defendant, now Respondent, the dowry paid for one Georgina, alleging that he is her guardian according to custom. It is alleged that in 1914 Georgina married Defendant's son Abner Pienaar, and that Defendant then paid nine cattle as dowry which were delivered to the Plaintiff, but owing to East Coast fever restrictions it was agreed that they should remain with Defendant. The Defendant denied that Plaintiff is Georgina's guardian and specially pleaded that he agreed to pay dowry, but in view of the fact that Plaintiff was not the guardian, according to custom, of Georgina, it was agreed that the cattle should remain with Defendant until the proper guardian claimed them. He also denied that Plaintiff ever took delivery of the dowry. Georgina is the daughter of Sophia, the illegitimate daughter of Emily Vetula; Georgina was given to the Plaintiff's mother by her sister, the mother of Emily Vetula.

It has not been shown that Georgina has any guardian according to native custom. It is clear that Plaintiff is not the guardian according to custom of Georgina; he, however, claims the right, as against the Defendant, to hold her dowry. There is no doubt that the dowry was actually paid to the Plaintiff in 1914.

The case having been placed before the Native Assessors they state that in the circumstances, the Plaintiff, who is related through his mother to Georgina, is, in the absence of a guardian, entitled to recover the dowry and hold it on behalf of a better claimant, who may eventually come forward, as a man who marries must have someone to receive her dowry and safeguard her rights, and that under no circumstances whatsoever, may the husband, his father or any one on their behalf retain it.

In view of this statement of native custom which, in the opinion of this Court, accords with the principles underlying the payment of dowry, the appeal will be allowed with costs.

The Defendant admits that the nine head of cattle paid have increased to thirteen. Judgment in the Court below will accordingly be entered for the Plaintiff for thirteen cattle or their value at £5 each, with costs.

1923, August 22.

Kokstad.

NGWEVENUNU *vs.* MACASIMBA.

(Mount Frere Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright
and H. E. Grant as Assessors.

Dowry cattle paid by description or word of mouth is sufficient payment.

The facts of the case are not material.

JUDGMENT.

By President: To the Plaintiff's (Respondent's) claim for delivery of certain dowry cattle which he alleged Defendant (Appellant) had described and pointed out to him, the Defendant excepted that no cause of action was disclosed, as the custom of ukuteleka prevails in the Baca tribe, of which the parties are members. The Defendant admits that the cattle in question were pointed out as alleged. The action is not based on an agreement to pay, but for the delivery of cattle symbolically paid, and the decision in the case of Monghayelana *versus* Msongelwa (3 N.A.C., 292) is therefore not in point. This Court held in the case of Robo *versus* Mandlebe (4 N.A.C., 213), heard at Kokstad on 27th August, 1919, that the custom of paying dowry by description or word of mouth constitutes a sufficient payment.

In the case of Xapa *versus* Ntsoko (1919, E.D.L., 177) it was held that where dowry cattle are definitely pointed out this constitutes delivery. This Court is of opinion that the Magistrate correctly decided against the exception taken by the Defendant, and the appeal is dismissed with costs.

1923, November 21.

Bntterworth.

MZILENI *vs.* MZILENI.

(Nqamakwe Case.)

Before J. M. Young, A.C.M., President, with R. D. H. Barry
and M. G. Apthorp as Assessors.

Dowry—Fine—Custom—Right of elder brother who is entitled to dowry of brother's eldest daughter, discussed—Acceptance by him of fine paid for the seduction of the girl in such cases bars a claim for dowry paid for her should a subsequent marriage take place.

JUDGMENT.

By President: The Respondent is the eldest son and heir of the late David Mzileni. Mina is his sister and the eldest daughter of the late David Mzileni. The Appellant is an elder brother of Respondent's father. Mina has been seduced and £15, a cow and an ox, have been paid to Respondent as damages for her seduction.

Appellant sued the Respondent in the Court of the Resident Magistrate at Ngamakwe for £15, portion of the fine paid, and alleged that he had paid the dowry, 12 head of cattle, of Mina's mother, and that having done so he was entitled under Native Law and Custom, to the dowry and any fines paid for Mina.

Respondent excepted to Appellant's claim on the ground "that the alleged Native Law and Custom upon which the Plaintiff bases his claim is non-existent." The Magistrate allowed the exception and dismissed the summons with costs.

It is a well-known principle of Native Law that the dowry of the eldest daughter of a son or brother belongs to the father or elder brother, if the father or elder brother has paid the dowry of the son's or younger brother's wife. The son or younger brother is entitled to portion of the cattle paid, but the apportioning of them is the right of the father or elder brother.

The question as to whether a fine paid for the seduction of the son's or younger brother's eldest daughter belongs to the father or elder brother who has paid the son's or younger brother's dowry does not appear to have been the subject of any previous case before this Court and a careful search of the records has failed to reveal any decision on this point.

On the matter being put to the Native Assessors they state in effect that in the circumstances disclosed in this case, the Appellant is entitled to the delivery of the fine paid for the seduction of the girl Mina, but, in the event of her subsequent marriage, he would be barred from claiming her dowry as well as the fine. This Court is in agreement with this expression of opinion. The appeal is allowed with costs, the exception overruled, and the case returned to the Magistrate to be heard on its merits.

1923, December 14.

Lusikisiki.

MRULWA *vs.* SEKETWAYO.

(Tabankulu Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and W. T. Hargreaves as Assessors.

Pondo Custom—In the absence of an agreement the Great House has no claim to the dowry of the first daughter of the Right Hand House.

In this case Plaintiff alleged that he was the heir to the Great House of his father and that Defendant was the heir to the Right Hand House; that Nomatikiti was the first daughter born of the Right Hand House, and that according to Native Law and Custom her dowry belongs to the Chief House. He claimed a declaration of rights regarding the girl Nomatikiti and her dowry, a portion of which Defendant had wrongfully received and converted to his own use. The Magistrate entered judgment for Plaintiff as prayed on these claims, as well as in other claims which have not been set out. Defendant appealed.

JUDGMENT.

By President: The facts having been placed before the Native Assessors they state unanimously that according to Ponde custom the Great House, in the absence of a special agreement, has no claim to the dowry of the first daughter of the Right Hand House. In view of this statement of custom the Plaintiff is not entitled to a declaration of rights to the girl Nomatikiti or to her dowry.

The appeal will accordingly be allowed with costs and that portion of the Magistrate's judgment declaring the Plaintiff entitled to the girl Nomatikiti and her dowry is altered to judgment for the Defendant. This Court is not prepared to interfere with the rest of the judgment.

1924, April 2.

Kokstad.

DIKENI *vs.* KLASS.

(Matatiele Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and H. E. Grant as Assessors.

Marriage by Christian rites—An agreement to pay dowry cattle is not illegal and may be enforced by law.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff, now Appellant, sued the Defendant, now Respondent, for certain stock, alleging that the Defendant had married his ward, Horiba, by Christian rites and that prior to the solemnization of the said marriage the Defendant had promised to pay him a dowry of 20 cattle, 10 small stock and 1 horse, of which 4 cattle and 1 horse had been paid, leaving a balance of 16 cattle and 10 small stock still due.

The Defendant denied liability. When the case came on for hearing the Magistrate raised the question as to whether the contract alleged could be sued upon as the marriage had been contracted according to Christian rites. After hearing the Plaintiff's attorney the Magistrate held that the contract could not be enforced and dismissed the summons. Against this ruling the Plaintiff has appealed. In the course of his argument, the Appellant's attorney has referred to several decisions of this Court and it is clear these have not been consistent, as is exemplified by the cases of Sihuhu *versus* Ntshaba (1 N.A.C., 62), Mangana *versus* Ntintili (1 N.A.C., 218), Nozozo and Joni *versus* Mahlala (3 N.A.C., 70), Nyakumbi Magadla *versus* Joel Nombewu (3 N.A.C., 71), Luto Njengaye *versus* Ben Mbola (3 N.A.C., 76), and Msingeleli *versus* Edward and Mashasha (3 N.A.C., 237).

In the opinion of this Court the alleged contract is not illegal and can be enforced. A similar ruling was given in the case of Luto Njengaye *versus* Ben Mbola (*supra*), the latest reported case in which this question was considered. That decision is consistent with the case of Nozozo and Joni *versus* Mahlala (*supra*). If dowry can be recovered under an agreement to pay when the marriage has been one according to native custom there seem to be no grounds for holding that it is not claimable simply because the marriage has been contracted according to Christian rites.

In the opinion of this Court the Magistrate was wrong in dismissing the summons and his judgment will accordingly be set aside.

In all the circumstances the costs of appeal will be ordered to abide the result in the Court below.

1925, March 11.

Umtata.

NDLELA *vs.* TSUM AND MAFOYI.*

(Qumbu Case.)

Before W. T. Welsh, C.M., President, with R. H. Wilson and R. C. E. Klette as Assessors.

Hlubi custom—Death of husband—Balance of dowry can be sued for.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The parties to this action are Hlubis. Plaintiff, Ndlela Maguba, sued Tsum Magwaza and Mafoyi Magwaza for six head of cattle and one horse or their value, £40, alleging that about ten years ago Mafoyi Magwaza married his daughter, Nogantolo, and paid certain cattle on account of dowry leaving a balance of six head of cattle and one horse due.

Tsum Magwaza objected to the proceedings on the ground of misjoinder in that Mafoyi Magwaza having died and left an heir the heir was the proper person to be sued.

In his plea he admitted the marriage between Mafoyi Magwaza and Nogantolo, and said that sixteen cattle had been paid as dowry. He denied Plaintiff's claim and stated that Mafoyi Magwaza died about 1918, that Nogantolo had deserted her husband's kraal about four years ago and that in consequence of Mafoyi's death and Nogantolo's desertion Plaintiff's claim for further dowry was extinguished.

Plaintiff, in his reply to the objection and plea, admitted that Mafoyi had died and asked for his name to be expunged from the record. He denied that sixteen cattle had been paid and stated that only fourteen had been delivered to him, and that Defendant Tsum Magwaza undertook to pay the balance of six cattle and a horse. He denied the desertion of

Nogantolo and said that, under Hlubi custom, her marriage with Mafoyi still subsists and that Defendant, Tsum Magwaza, is liable for the balance of the dowry.

Before any evidence was led the Magistrate was asked to rule on the points of law raised in the pleadings. He did so and entered judgment for Defendant with costs. He held that if the agreement to pay twenty head of cattle and a horse had been proved Tsum Magwaza and Mafoyi Magwaza would have been liable jointly and severally, the one paying the other to be absolved, and that, Mafoyi Magwaza having died, it was competent for Plaintiff to recover from Tsum Magwaza, but that the old Native Custom under which death of the husband did not annul the marriage unless the dowry paid for the wife had been returned, had been abrogated by the ruling in the case of Mbono *versus* Manxiweni and subsequent decisions of this Court, and, this being the case, Mafoyi Magwaza's death dissolved the marriage and consequently Plaintiff's claim for balance of dowry after his death must fail.

The question for decision by this Court is whether, under Hlubi custom, where a contract to pay dowry has been entered into and portion of the dowry has been paid during the husband's lifetime, the balance can be claimed after his death.

In the case of Mbozo Qhoboshane *versus* Mbongeli Mbolo (IV N.A.C., 209), in which the parties were Hlubis and where it was quite clear that the husband was dead at the time of the action, it was held that the dowry could be sued for.

In view of this decision this Court is of opinion the Magistrate erred in holding that Plaintiff cannot claim the balance of dowry.

The appeal is allowed with costs, the Magistrate's ruling set aside and the case returned to him to be dealt with on its merits.

1925, March 11.

Umtata.

MAHLELO AND MAZIZI *vs.* MEHLWANTSUNDU.

(Umtata Case.)

Before W. T. Welsh, C.M., President, with F. N. Doran and R. C. E. Klette as Assessors.

Delivery of dowry cattle—Left with payer—Ownership.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff, now Respondent, sued the Defendants, now Appellants, for 8 cattle or their value, alleging that these were dowry which the latter had paid and delivered to him for his daughter, Nompotswana, which cattle

after delivery, were left with the Defendants, pending a removal permit being obtained. He further alleged that the Defendants had rejected and driven away the said Nompotswana and acting in concert had refused or neglected to hand over the said dowry cattle.

The Defendants denied liability and pleaded that Nompotswana was pregnant when the marriage was celebrated, that the Plaintiff had refused to co-operate with them in taking action against the seducer, and that the girl, after being returned to them, had deserted again.

The Magistrate gave judgment in favour of the Plaintiff as prayed and against this judgment the Defendants have appealed on the following grounds:—

- (1) That the Magistrate was wrong in finding on what he considers is the legal position only and not giving a finding on fact, since it is clear that the woman has returned to her father and for no good reason states definitely that she will not go to Defendant No. 1.
- (2) That the judgment is wrong in law, since the Plaintiff cannot in the circumstances succeed.
- (3) That the judgment is also legally wrong, for the reason that Plaintiff himself demanded a dissolution of marriage which was acceded to and the outfit tendered him.
- (4) That on the Magistrate's legal finding there is no liability on the part of Defendant No. 1, who should have been absolved.

It is clear that the dowry was paid over to and duly accepted by the "duli" on behalf of the Plaintiff, but was left by them, acting within the scope of their authority, in the custody of the Defendants pending its removal to the Plaintiff's kraal when a permit could be obtained.

In view of the decisions in the cases of *Robo versus Madlebe* (IV N.A.C., 213), *Ngwevununu versus Macasimba* (heard at Kokstad in August, 1923)*, *Matshoba versus Maka* (1916, E.D.L., 59) and *Xapa versus Ntsoko* (1919, E.D.L., 177), the ownership in these cattle passed to the Plaintiff and no authority has been cited before this Court in support of the Appellant's contention that they have the right to withhold and deprive him of his property in the manner disclosed.

This Court is, therefore, of opinion that the Magistrate came to a correct conclusion on the issues which the summons and pleadings disclosed, which must be looked to for the cause of action and it is not necessary to discuss what would be the position had a counterclaim for the return of Nompotswana or her dowry been put forward.

In regard to the fourth ground of appeal the summons emphasises that the Defendants were acting in concert and as no objection in terms of the Rule was taken to this allegation the Court is of opinion that the matter cannot be raised now for the first time.

The appeal is dismissed with costs.

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1925, April 3.

Kokstad.

SOGA *vs.* SIBEKUBULA.

(Mount Frere Case.)

Before W. T. Welsh, C.M., President, with F. E. H. Guthrie
and H. E. Grant as Assessors.

*Hlubi Custom—Death of wife—Action by father for balance
of dowry.*

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT

By President: The Plaintiff, now Appellant, sued the Defendant, now Respondent, for fourteen cattle and one horse which he alleged was the balance of dowry due to him according to Hlubi custom.

He states that his sister had been married to the Defendant for several years, during which she bore him five children and then died. The matter having been placed before the Native Assessors they unanimously state that according to Hlubi custom the husband is bound to pay the balance claimed, the woman not having rejected her husband, but having died during the subsistence of the marriage. In view of this statement of Hlubi custom the appeal will be allowed with costs and the judgment of the Court below altered to one for the Plaintiff as prayed.

1926, May 18.

Kokstad.

MOKOATLE *vs.* NTLABATI.

(Matatiele Case.)

Before J. M. Young, Ag. C.M., President, with W. G.
Wright and H. E. Grant as Assessors.

Objection to appeal in that order appealed against is interlocutory—Dowry—Firing of number of by Magistrate—Judgment outside summons.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT ON OBJECTION.

By President: Mr. Zietsman, for Respondent, objects to the appeal on the ground that the order appealed against is merely interlocutory, and not a final and definitive sentence, and in effect only postpones a final judgment on the counterclaim for a period of six months.

In view of the wording of the Magistrate's judgment, which orders the Plaintiff, Defendant in reconvention, to pay over to Defendant, Plaintiff in reconvention, a stated number of cattle within a specified time, this Court is of opinion that the order is not an interlocutory one, and that an appeal lies.

The objection is overruled with costs.

JUDGMENT.

By President: The Appellant claimed from Respondent the return of his dowry or its value, £50, and alleged that about the year 1922 he paid to Respondent eight head of cattle on account of a proposed marriage between Appellant and Respondent's sister, Marian; that such cattle have now increased to ten, and that before the marriage took place Marian was rendered pregnant by some other man, and that in consequence, he, Appellant, is entitled to put an end to the marriage negotiations and demand the return of the cattle paid and their increase, or their value, £50.

The Respondent admitted the receipt of seven cattle as dowry and stated that there was only one increase, and that, of the cattle and increase, a cow and calf died, leaving six head of cattle in his possession. He alleged that Appellant had "twalaed," seduced and made pregnant his sister Marian, and denied that he was liable for the return of any of the cattle paid as dowry.

As a counterclaim, he claimed an order declaring that, as Appellant had rejected Marian, the dowry paid on account be forfeited, and asked the Court to order that, failing payment of the balance of dowry within a reasonable time, the cattle paid on account of dowry be declared forfeited.

On the claim in convention, the Magistrate granted an absolution judgment, and on the claim in reconvention, he ordered the Appellant to pay a further three head of cattle to Respondent within six months, after which the marriage to be proceeded with, and failing compliance with this order, application to be made to the Court for further relief.

Against the order on the claim in reconvention, an appeal has been brought on the grounds—

- (1) that there is nothing on the records to show that the dowry to be paid by Defendant in reconvention to Plaintiff in reconvention was fixed at the time of the engagement or any subsequent time, or that any additional dowry was due and payable by Defendant in reconvention. The witness Marian says in her evidence "I am a Xosa," and Xosas do not fix their dowry;
- (2) that Plaintiff in reconvention did not ask for judgment for additional dowry cattle, but prayed for an order "that failing payment of the balance of dowry within a reasonable time, the cattle already paid be declared forfeited," and the Magistrate has therefore given judgment for something which was not asked for and in respect of which no evidence was led;
- (3) that the judgment delivered by the Magistrate on the claim in reconvention is one which he had no power or right to give.

It would seem that the Magistrate in finding against Appellant on the claim in convention was not satisfied that Marian had been made pregnant by some other man.

There is nothing on record to show that any fixed dowry was agreed upon and, in the absence of any evidence on this point, it was not competent for the Magistrate to make an order for the payment of any stated number of cattle.

The appeal is allowed with costs, and the Magistrate's judgment on the claim in reconvention altered to absolution from the instance with costs.

1926, July 12.

Umtata.

KONDILE *vs.* MKOHLAKALI.

(Mqanduli Case.)

Before J. M. Young, Ag. C.M., President, with W. J. Davidson and G. M. B. Whitfield as Assessors.

Dowry—Father of adulterine child, who subsequently married the mother, not entitled to the dowry paid in respect of such child.

The facts of the case are immaterial.

JUDGMENT.

By President: It is abundantly clear from the record that at the time that Nozingazi was conceived, Nobuku was the wife of Pongomile. This being so, it is immaterial whether, on the dissolution of the marriage, Appellant's father married Nobuku, as Nozingazi would be a child born of adulterous intercourse, and, following the decision in the case of Magwala *versus* Mbo * heard in this Court at Umtata in March, 1926, the Appellant is not entitled to the dowry paid for Nozingazi.

The appeal is dismissed with costs.

1926, July 19.

Butterworth.

TIYEKA *vs.* SIKAYI.

(Kentani Case.)

Before J. M. Young, Ag. C.M., President, with F. H. Brownlee and G. D. S. Campbell as Assessors.

Dowry—Engagement—Earnest Cattle—Returnable when girl dies before marriage takes place.

Plaintiff paid Defendant as dowry a certain black heifer which has increased to five head of cattle.

Before the marriage took place the Defendant's daughter died and Plaintiff, some six years after the death of his intended bride claimed the return of the original earnest beast and its progeny or £25. The Magistrate entered judgment for Plaintiff as prayed and Defendant appealed against this judgment.

* Page 27 of these Reports.

JUDGMENT.

By President: The Magistrate has gone very carefully and very fully into this case, and this Court sees no reason to disturb his finding on the facts.

With regard to the question of the increase, the circumstances of this case were put to the Native Assessors who state:—

“Where the girl dies before the marriage takes place, the dowry paid, together with any increase, is returned.”

This expression of opinion is in conformity with previous decisions of this Court.

The appeal is dismissed with costs.

1927, March 2.

Umtata.

SIKWATI *vs.* MTSHALALA.

(Umtata Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and E. G. Lonsdale as Assessors.

Claim for repayment of beast given for ceremonial purposes—Beast not returnable between uncle and nephew who conducted themselves as father and son—Postponement, when to be granted.

JUDGMENT.

By President: The Plaintiff claims from the Defendant three cattle or their value, £15, alleging that his late father had contributed two head towards the dowry of the Defendant's late father and one beast for ceremonial purposes, and that it was agreed between the parties that the former would be reimbursed out of the dowry of the latter's first daughter. The Magistrate found for the Plaintiff for the beast killed and for the Defendant as regards the two dowry cattle.

The Native Assessors having been consulted state that as the parties were uncle and nephew and conducted themselves as father and son the Defendant is under no obligation to make good the beast now claimed. This expression of opinion is consistent with the decision in the case of Tshaka *versus* Buyesweni (1. N.A.C. 144).

In the opinion of this Court no agreement to repay this beast has been proved and it is unable to agree with the Magistrate, who in finding for the Plaintiff, states that in the absence of clear proof of a contrary agreement there would, under Native Custom, be an implied undertaking to reimburse the Plaintiff out of the dowry of the first daughter married.

In regard to the Cross-Appeal this Court is of opinion that the Magistrate erred in refusing the postponement. The



application was made at the close of the Plaintiff's case before any of the Defendant's witnesses had been heard and there is nothing on record to suggest that the request was either vexatious or unnecessary. In the circumstances disclosed this Court is of opinion that there were no sufficient grounds for refusing the postponement, which should have been granted on such terms as the Magistrate may have ordered under the Rules.

The appeal and the cross-appeal will be allowed each with costs, the judgment of the Court below will be set aside and one entered of absolution from the instance with costs.

1927, March 15.

Butterworth.

KANISA vs. NGODWANE.

(Tsoimo Case.)

Before W. T. Welsh, C.M., President, with F. H. Brownlee and W. F. C. Trollip as Assessors.

Subsistence of Christian marriage—Wife's desertion—Claim for restoration of dowry held to be premature—Jurisdiction of Magistrate's Court—Section 6 (2) of Proclamation No. 142 of 1910.

JUDGMENT.

By President: In this case Plaintiff, now Respondent, sued Defendant, now Appellant, for the return of his wife Rosie or in default thereof the restoration of the dowry paid.

Plaintiff married Defendant's daughter in 1902 by Christian rites in respect of which marriage a dowry of six cattle and £5 was paid. Plaintiff's wife is alleged to have deserted him in 1914 refusing to return. To this claim Defendant excepted that the action was premature in that the marriage had not been dissolved by a competent court. The exception was overruled and after going into the merits of the case the Magistrate entered judgment for the Plaintiff for the return of his wife within 30 days failing which the restoration of his dowry.

Against this judgment Defendant has appealed on the following grounds:—

- (a) That the action brought by Plaintiff for recovery of his dowry is premature in that the Christian marriage stated and admitted in the pleadings had never been dissolved by a competent court.
- (b) That the Magistrate's Court has not the jurisdiction to order the return of a deserting spouse where the marriage is a marriage according to Colonial Law.

The Magistrate's judgment ordering the woman to return to her husband within 30 days is in effect an order for the restitution of conjugal rights which by Section 6 (2) of Proclamation No. 142 of 1910 is excluded from the jurisdiction of Magistrate's Courts.

The return of dowry either voluntarily or by Order of Court dissolves a marriage contracted according to Native Law and Custom, but can have no such effect upon a civil marriage.

An action for the return of a wife married according to Native Custom results either in the return of the wife or the dissolution of the marriage by the restoration of the dowry, a position incapable of reconciliation with a civil marriage.

An order for the return of the dowry without a dissolution of the marriage would place the husband in possession both of his dowry and his wife a condition entirely opposed to Native Custom and one which could easily lead to collusion and fraud.

It has been laid down repeatedly by this Court that dowry paid in connection with a marriage whether contracted according to civil rites or Native Custom must be dealt with under Native Law. This Court has also held that where a marriage has been contracted by civil rites no claim for the restoration of the dowry can be entertained during the subsistence of the marriage.

This Court is of opinion that the exception was well taken and that the Magistrate erred in overruling it. The appeal will accordingly be allowed with costs; and the Magistrate's judgment altered to one upholding the exception with costs including all costs in the court below.

1927, November 10.

Umtata.

LILANI vs. SISULU.

(Engcobo Case.)

Before W. T. Welsh, C.M., President, with G. M.B. Whitfield and R. C. E. Klette as Assessors.

Dowry—Great House can only claim dowry paid for daughter of Minor House to replace cattle actually paid for the wife of such Minor House—Illegitimate children—Custody and guardianship of illegitimate daughter of the Right Hand House remains with the Right Hand House Great House claim for re-imbursement of dowry paid for the Right Hand wife only extends to the dowry paid for daughters of that House, and not to the dowry received for the daughters of daughters—Maintenance—Not claimable in respect of a girl borrowed for a temporary purpose.

JUDGMENT.

By President: In this case Plaintiff, now Appellant, sued Defendant, now Respondent, for—

- (a) a declaration of rights and custody of a girl named Nongemkiyo;

(b) delivery of 8 dowry cattle paid for Nongwiqi and 2 dowry cattle paid for Novemtanda, or their value £50, and stated in his particulars of claim:—

- (1) That Plaintiff is the heir of the Right Hand House of the late Jack Mkomo;
- (2) that Defendant is the heir of the Great House of the late Jack Mkomo;
- (3) that Nongwiqi is the illegitimate offspring of Plaintiff's sister Nontsula, and that Plaintiff is therefore entitled to her and to her dowry;
- (4) that about two years ago one Makeleni Mkomo received 8 dowry cattle for her on behalf of Plaintiff and about April last Defendant wrongfully and unlawfully took possession of the said cattle;
- (5) that Novemtanda is Plaintiff's sister and he is therefore entitled to her dowry;
- (6) that about last spring-time Defendant received as dowry for this girl 2 head of cattle;
- (7) that Nongemkiyo is the illegitimate offspring of Plaintiff's sister Novemtanda and he is therefore entitled to her custody;
- (8) that in spite of due demand Defendant refused to hand over the said girl and the said dowry to Plaintiff.

Defendant pleaded admitting paragraphs Nos. 1 and 2 and also paragraph 3 to the end of the word "Nontsula," but says as to the latter that she was the eldest daughter of the Right Hand House and belonged by custom to the Great House, and Defendant as heir of the latter House is entitled to the fruits of her seduction, whether by cattle or child.

He denies paragraph 4 but says it is immaterial in view of the foregoing. He admits paragraphs 5 and 6 and says he tendered the two head of cattle to Plaintiff before Headman Jama (Baty) about May last and repeats his tender.

As to paragraph 7, he admits it but says that he has maintained the child Nongemkiyo since birth and he is entitled to a beast for her maintenance, which has neither been paid nor tendered, and pleads that Plaintiff's right to claim her custody is stayed till he has paid or tendered such beast or £5 its value. Defendant claims judgment as regards paragraph 3 and absolution as to paragraph 7, Plaintiff being entitled to judgment for two cattle under paragraph 6 as already tendered.

In reply Plaintiff denies that Defendant has any right to the fruits of Nontsula's seduction whether by way of cattle or child. Plaintiff denies the tender of two head of cattle. Plaintiff further denies that Defendant maintained the child Nongemkiyo since birth and says that about the autumn of 1926 Nongemkiyo was "borrowed" by Defendant. He contends that Defendant has no right to claim an "Isondlo" beast.

The Magistrate in his reasons for judgment found the following facts proved:—

- (1) That there was no tender of the two cattle claimed in paragraph 6 of the summons before its issue.
- (2) That Makeleni Mkomo had provided his brother Jack Mkomo with the cattle to obtain his Right Hand House wife.
- (3) That Makeleni Mkomo advanced these cattle on behalf of Jack Mkomo's Great House because there could not be a Right Hand House until the cattle had been paid and a wife obtained.
- (4) That the dowry of Nontsula went to Makeleni Mkomo.
- (5) That Nontsula was seduced by one Gwadu who paid a fine for such seduction and would therefore have a right to the cattle paid as dowry for the girl Nongwiqui.
- (6) That Defendant as heir of the Great House was guardian of the girl Nongwiqui and had the right to the custody of her dowry pending any claim to them by Gwadu.

The Magistrate states that he is unable to follow the grounds of appeal as the case was decided on the pleadings and the evidence. He further states that the order as to costs was in accordance with the judgment; and that no tendered evidence was excluded. Judgment was entered as follows:—

- (1) In respect of the 8 head of cattle claimed for Nongwiqui; Absolution from the instance.
- (2) In regard to the 2 head claimed for Novemtanda, for Plaintiff as prayed; execution stayed until Plaintiff pays to Defendant one beast for maintenance, or the value thereof, £5.
- (3) In regard to the custody of the girl Nongemkiyo, for Plaintiff as prayed.
- (4) Costs of proceedings up to date of delivering of plea containing tender to be paid by Defendant.
- (5) Costs of hearing in Court to be paid by Plaintiff.

Plaintiff appealed against the whole judgment on the grounds *inter alia*:—

- (1) That as paragraph 4 of the claim set out that Plaintiff had been wrongfully and unlawfully deprived of the possession of Nongwiqui's dowry by Defendant this issue should have been determined on the pleadings.
- (2) That the judgment in favour of Defendant for an "Isondlo" beast for Nongemkiyo is against the weight of evidence and Native Custom.
- (3) That the proceedings relative to the judgment of absolution from the instance are wholly irregular.

- (4) That the judgment as to costs is bad in law and the Magistrate failed to exercise a judicial discretion in regard thereto.
- (5) That generally the judgment is against the weight of the evidence and the facts admitted by Defendant.

Dealing with the Magistrate's judgment in the order recorded this Court is of the opinion that he has erred in absolving Defendant in regard to Plaintiff's claim as to the custody of the girl Nonwiqui or the dowry paid for her.

- (1) In *Ngomtini Debeza versus Tsitsa Debeza* (4. N.A.C. 73) this Court decided that a Great House can only claim the dowry paid for the eldest daughter of a Minor House to replace cattle actually paid away by the Great House of such Minor House. In the present case there is uncontroverted evidence that the dowry of the Right Hand House wife of the late Jack Mkomo was provided by his brother Makeleleni Mkomo who, to reimburse himself, appropriated both the fine paid for the seduction of the eldest daughter of the Right Hand House as well as her dowry.
- (2) In the case of *Mvula Nofidela versus Ngqola Kekisana* (4. N.A.C. 117) this Court decided that the custody and guardianship of the illegitimate daughter of the eldest daughter of the Right Hand House remains with that House and that the claim of the Great House for reimbursement of dowry paid for the Right Hand House wife only extends to the dowry paid for the daughters of that House and not to dowry received for the daughters of daughters.

Accordingly the Magistrate should have awarded Plaintiff the eight head of cattle in question.

In regard to the claim by Plaintiff for the two dowry cattle paid for his sister Novemtanda the Magistrate in the opinion of this Court has erred in staying execution until Plaintiff had paid a maintenance beast as none was claimed and none was due in respect of Novemtanda.

The Court below rightly awarded Plaintiff the custody of the girl Nongemkiyo.

This Court finds that the preponderance of evidence adduced favours Plaintiff's contention that Defendant had borrowed the girl for a temporary purpose and that he is not entitled to claim maintenance for her in the circumstances disclosed.

Accordingly the appeal is allowed with costs and the judgment in the Court below altered to read as follows:—

- (a) Plaintiff is declared entitled to a declaration of rights to and the custody of the girl Nongemkiyo, with costs.
- (b) For Plaintiff as prayed for the 8 head of cattle paid as dowry for Nonwiqui or their value £40 and costs of suit.
- (c) For Plaintiff for the 2 head of cattle paid as dowry for Novemtanda or their value £10.

1927, April 4.

Kokstad.

ZOMBOVU *vs.* NOWALAZA.

(Umzimkulu Case.)

Before J. M. Young, A.C.M., President, with W. G. Wright
and F. N. Doran as Assessors.

*Engagement—Payment of 9 head of cattle—Suiter not
obliged to comply with unreasonable demands of father.*

Plaintiff became engaged to marry Defendant's daughter and paid from time to time over a period of three years the equivalent of 9 head of cattle as dowry. He then asked for the marriage to be proceeded with but Defendant demanded the payment of the sum of £10, a shawl and a "Nqutu" beast. Plaintiff did not comply with the demand and Defendant allowed his daughter to become engaged to another man. A "Nqutu" beast was then tendered but refused, and Defendant contended that, as Plaintiff had not complied with his demands, he had broken off the engagement.

JUDGMENT.

By President: The Magistrate has erred in holding that, on the facts before him, the Appellant was responsible for the breaking off of the engagement. Appellant has paid the equivalent of 9 head of cattle. This, in the opinion of the Court, was a reasonable dowry and a sufficient payment to justify him in asking for the ceremony to be proceeded with. The demands of the Respondent are unreasonable.

The appeal is allowed with costs and the record returned to the Magistrate for judgment after having heard evidence as to the number of deaths and increase.

1923, August 15.

Lusikisiki.

MAMTSHIKELWENI *vs.* NGCIKANA.

(Flagstaff Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson
and E. W. Bowen as Assessors.

*Marriage, dissolution of, at suit of wife—Due cause must be
alleged and shown.*

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff sued the Defendant for an order that the marriage subsisting between herself and the Defendant, her husband, may be dissolved on the grounds:—

- (1) That the Defendant married the Plaintiff some time before East Coast Fever and paid 4 head of cattle to her father as dowry for her.

- (2) That the Plaintiff's said father is dead and the said Zibonele is her guardian in accordance with Native Custom.
- (3) That of the above marriage 5 children were born, 2 of whom are still alive and 3 dead.
- (4) That about East Coast Fever time the Plaintiff left the Defendant and returned to her father's kraal where she has resided ever since, and where the Defendant used to visit her, from time to time, up to about three years ago.
- (5) That the Plaintiff and the Defendant then quarrelled and the Plaintiff has no intention of returning to her husband.
- (6) That she, through her guardian, has tendered to the Defendant 1 head of cattle to dissolve her marriage, in accordance with Native Custom, which beast the Defendant refuses to accept.

The Defendant excepted that the Plaintiff's summons disclosed no cause of action for the dissolution of a marriage under Native Custom.

The Magistrate upheld the exception and dismissed the summons with costs. Against this ruling the Plaintiff has appealed.

It was decided by this Court in the case of *Nocujini versus Nteta* (2, N.A.C. p. 106) that a woman may divorce herself by returning to her husband the cattle paid by him as dowry for her, but that when an application for an order for dissolution is made in Court, it becomes necessary for the woman to show good and sufficient cause before the Court will make such an order. In the case of *Nomatusi versus Nompetu* (3, N.A.C. p. 165) it was ruled that a man or woman bringing an action into Court for relief from the marriage tie must allege and prove due cause.

In the opinion of this Court the summons does not allege any good or sufficient cause on which an action for dissolution of marriage can be based. The appeal is dismissed with costs.

1923, December 13.

Lusikisiki.

MNUKWE *vs.* MKOHLWA.

(Bizana Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and J. W. Mitchell as Assessors.

Practice—Magistrate's decree of divorce, granted at the suit of wife, is not in itself sufficient ground for action by the husband for restoration of dowry.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The marriage between Mabuzweni and Mkohlwa, the present Plaintiff, was dissolved by an order of the Magistrate's Court on 4th October, 1921. Whether the terms of that order are correct or not it is a judgment of the Court and has apparently not been questioned. The dissolution was granted at the suit of the Plaintiff's wife who alleged that she had been driven away and neglected for six years.

The Plaintiff now claims that he is entitled to a return of 3 cattle alleged to be the balance of dowry paid after allowing the usual deductions for five children on the ground that Mabuzweni, his wife, obtained an order of divorce against him in 1921. The mere fact that his wife divorced him, does not, in the opinion of this Court, entitle the Plaintiff to claim a refund of the dowry paid. If he has good grounds they should be alleged.

The appeal is allowed with costs and the judgment altered to absolution from the instance with costs.

1924, April 4.

Lusikisiki.

JUBELE *vs.* SOBIJASE.

(Bizana Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and E. W. Bowen as Assessors.

Father may not dissolve his daughter's marriage without her consent.

Plaintiff (Respondent) claimed from Defendant (Appellant) damages for adultery with his wife Mabizelwe, daughter of Komityi and stated that during his absence at the mines Defendant took, and lived in adultery with, his wife Mabizelwe.

Defendant pleaded that Mabizelwe was his own wife and that he paid dowry for her, and in reconvention Defendant (now Plaintiff) claimed damages from Plaintiff (now Defendant) for adultery and stated that he was the lawful husband of Mabizelwe and that Plaintiff took her, Mabizelwe, to his kraal and lived in adultery with her.

It was admitted by Komityi, father of Mabizelwe, that his daughter was first married to Defendant and subsequently to Plaintiff.

Mabizelwe stated that she never consented to the dissolution of her marriage with Defendant, and maintained that she was still his wife.

Defendant denied that he was ever willing to dissolve the marriage or that he accepted restoration of the dowry cattle paid by him.

JUDGMENT.

By President: In the opinion of this Court the Defendant and his wife did not acquiesce in the dissolution of their marriage which Komityi endeavoured to arrange in the absence of Jubele, husband of his daughter Mabizelwe. She denies that she ever consented to her marriage being dissolved.

Jubele's father, Gqibane, also asserts that he did not agree to the dissolution, and refused to accept the cattle tendered by Komityi, and consulted the headman who advised him to retain them till Jubele returned home.

The subsequent conduct of Jubele and Mabizelwe has been entirely inconsistent with the allegation that they at any time agreed to the dissolution of their marriage.

In the case of Gam Marawu *versus* Magoloza Mzima (3, N.A.C. 171) it was ruled that a father may not dissolve his daughter's marriage without her consent.

This Court is therefore of opinion that the Magistrate has erred.

The appeal is allowed with costs and the judgment in convention altered to one for the Defendant with costs.

A plea to the claim in reconvention has not been filed and to enable this to be done and the matter gone into the Magistrate's judgment in favour of the Defendant in reconvention will be altered to one of absolution from the instance with costs.

1926, December 6.

Kokstad.

LIWANI *vs.* BATAKATI.

(Mount Fletcher Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and H. E. Grant as Assessors.

Dissolution of marriage—Adultery by woman and desertion with paramour and refusal to return constitute sufficient cause for dissolving marriage and return of dowry.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff claimed from the Defendant an order declaring his marriage with Dina, the Defendant's sister, dissolved on the ground that the said Dina had deserted and eloped with one Xaba. He also claimed the return of his dowry.

It is clear that during the Plaintiff's absence at work Dina eloped with Xaba with whom she lived in adultery for several months prior to the institution of these proceedings.

It is evident that Dina has deserted the Plaintiff and has no intention of returning, in fact she has disappeared.

Although in the case of *Charlie Ngxala versus Agnes Ngxala* (3, N.A.C. 165) it was held following previous decisions that an act of adultery committed by a woman living with her husband at his kraal is not sufficient ground for granting a divorce, this Court is of opinion that where a woman without cause deserts her husband and elopes with another man with whom she persists in living in adultery and will not return, her husband is entitled to an order dissolving the marriage and to the return of his dowry.

A similar view was taken by this Court in the case of *Gomfi versus Mdenduluka* (3, N.A.C. 21).

The Plaintiff has abandoned the judgment in so far as one beast or its value is concerned. In dismissing the appeal with costs the Magistrate's award will be reduced from 7 cattle or their value £35 to 6 cattle or their value £30.

1927, August 8.

Lusikisiki.

NGAMANI *vs.* SITSACA.

(Ngqeleni Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and F. C. Pinkerton as Assessors.

Desertion by wife—Harbouring—Whom to sue.

Sitsaka sued Ngamani for the restoration of his wife Mamncane and £10 damages and costs of suit. His wife deserted him and took up her residence at the kraal of Ngamani who claimed that he was the owner of the girl and the dowry paid by Sitsaka should have been paid to him and not to Manjucu, her father.

The Magistrate entered judgment for Sitsaka. Ngamani appealed.

JUDGMENT.

By President: This court is unable to agree with the Magistrate in distinguishing this case from that of *Maseti versus Sinxoto* (1, N.A.C. 197) where it was laid down that when a woman married according to Native Custom deserts her husband his only remedy is to sue the person who holds the dowry for her return, failing which for the dowry, and that actions against other persons for harbouring are unknown to Native Custom. In the opinion of this Court the Plaintiff has failed to show that he has any cause of action against the Defendant.

The appeal will accordingly be allowed with costs and judgment in the Court below will be altered to one for the Defendant with costs.

1923, August 21.

Kokstad.

JAJILE vs. GXUMISA.

(Mount Frere Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright
and H. E. Grant as Assessors.

*Admission of irrelevant evidence—Power of Court to set aside
Proceedings.*

The facts of the case are not of importance.

JUDGMENT.

By President: The Magistrate appears to have been greatly influenced in his decision by the question of ownership. That issue was not raised in the pleadings which merely denied all the allegations contained in the summons.

The evidence of ownership is not relevant to the issue, and it is not understood why its admission was not objected to. Had the hearing been confined to the pleadings it is possible that the Magistrate would have come to a different conclusion. Bearing these circumstances in mind this Court is of opinion that under its power of review the proceedings should be set aside. The appeal will accordingly be allowed, and the proceedings subsequent to plea set aside.

As the Appellant, Plaintiff in the Court below, did not object to the admission of the evidence of ownership adduced, the costs of appeal and the costs in the Court below will be ordered to abide the result of the action.

1924, December 8.

Kokstad.

JIBA vs. VANGIDZI.

(Umzimkulu Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright
and P. S. Laney as Assessors.

*Dowry—Engagement—Tacit handing over of woman—Claim
for seduction after payment of engagement cattle as dowry.*

Defendant became "engaged" to Plaintiff's ward and paid certain stock as "engagement" cattle. The woman then lived with him. She was never formally handed over by Plaintiff. During her stay at Defendant's kraal he rendered her pregnant. She subsequently left him. Plaintiff sued Defendant for damages for seduction and pregnancy. Defendant contended that a marriage had taken place and regarded

the "engagement" cattle as forming part of the dowry. He counter-claimed for the return of the woman or alternatively for the stock paid. The Magistrate found for the Plaintiff in convention and Defendant in reconvention. Defendant appealed.

JUDGMENT.

By President: The main essentials of a native marriage are the payment of dowry and handing over of the woman.

Though there is no evidence of the woman having been handed over formally by her guardian it is clear he allowed her to live with the Defendant as his wife for a considerable period, without any objection whatever, indeed the woman admits this. This Court is therefore of opinion that the Magistrate erred in finding that there had been no marriage. *Vide* N.A.C. I pp. 17 and 102, N.A.C. II p. 183, N.A.C. IV pp. 209 and 213.

In regard to the claim in reconvention for the return of the woman or the dowry paid, ill-treatment has not been pleaded, and is therefore not in issue.

The plea of rejection has not in this Court's opinion been established.

The appeals in convention and in reconvention are allowed with costs. The judgment in convention will be altered to one for the Defendant with costs and in reconvention for the Plaintiff for the return of his wife within one month failing which for the return of two cattle and one horse—or their value at £5 each, and 2 goats or their value 10s. each with costs less one beast deducted for the child.

1926, March 16.

Butterworth.

MFAKADOLO *vs.* MNYUME. (Idutywa Case.)

Before W. T. Welsh, C.M., President, with F. H. Brownlee and W. F. C. Trollip as Assessors.

Evidence—Proof—Documentary—Cattle permit.

A ground of appeal was that the Magistrate did not give sufficient consideration to the importance of a cattle removal permit put in by consent, and that his judgment was, in consequence, against the weight of evidence. The Magistrate stated in his reasons that he did not "consider the copy of the permit produced of any value whatever as no evidence was adduced to prove that Johannes or anyone else obtained it, or who produced the dipping certificate on which the permit was granted."

JUDGMENT.

By President: In the opinion of this Court the permit admitted by consent is of considerable importance and should have been given due weight by the Magistrate as supporting the Defendant's version of the transaction. In the conflict

of evidence, this Court is of opinion that the permit issued in May, 1924 authorizing the removal of a heifer by Johannes from the Shixini Tank area where the Defendant dipped, to the Gwadana Tank, where the Plaintiff dipped is strong corroboration of the Defendant's contention that the heifer was removed in 1924 when the claim was settled as alleged by him.

This being so, the evidence of the Plaintiff that the adultery was reported to the sub-headman during 1925, where certain admissions were alleged to have been made, cannot be accepted as satisfactory, as Fuzele was away during the whole of that year.

With regard to the Magistrate's comments on the permit, it must be presumed to be what it purports to be until the contrary is proved.

This Court is therefore of opinion that the Magistrate was not justified in finding for the Plaintiff.

The appeal will be allowed with costs and judgment altered to one for the Defendant with costs.

1926, March 9.

Umtata.

MANXOWENI *vs.* SIBEKA.

(St. Marks Case.)

Before J. M. Young, A.C.M., President, with E. G. Lonsdale and R. C. E. Klette as Assessors.

Evidence—Possession—Person claiming must establish his ownership beyond reasonable doubt.

The facts of the case are not material.

JUDGMENT

By President: In the opinion of this Court the Magistrate has erred. He does not appear to have given sufficient consideration to the evidence of the Government Veterinary Officer whose testimony corroborates that of the Defendant and his witnesses as to the age of the animal. It is true that there is a conflict of evidence as to whether or not the animal bore an earmark at the time it was taken from the grazing ground by the Plaintiff.

The Magistrate appears to have attached too much weight to the evidence of Sergeant Flannigan on this point and has overlooked that of Mr. de Villiers, the Veterinary Officer, who says that when he examined the mare the earmark was not a recent one.

The mare was found in the possession of Defendant and it is for Plaintiff to establish beyond reasonable doubt that it is his. In the opinion of this Court he has not done so.

The appeal is allowed with costs and the Magistrate's judgment altered to Judgment for Defendant with costs.

1926, August 16.

Kokstad.

MONAKALI vs. MVELENI.

(Mount Frere Case.)

Before J. M. Young, Ag. C.M., President, with F. E. H. Guthrie and W. G. Wright as Assessors.

Property in possession of third party—Person claiming must prove dominium.

The facts are immaterial.

JUDGMENT.

By President: In this case the Plaintiff seeks to vindicate his ownership in a certain black and white cow, purchased from one Mtakati whilst in possession of Defendant.

To succeed in an action of this nature, it is incumbent on the Plaintiff to prove *dominium*, which, if he is unable to do so, the Defendant must be absolved. *Dominium* is proved if the Plaintiff establishes the *dominium* of the person from whom he got title, under which the *dominium* was passed to him from such person.

It is clear from the Magistrate's reasons that Plaintiff has failed to establish this proof. There is only the evidence of Mtakati that the cow in question was indicated to him by Defendant. This is denied, as also the advance of the money. The witness Mtakati's evidence throughout is self-contradictory as well as in conflict with that of the Plaintiff, and under the circumstances this Court is of opinion that Plaintiff cannot succeed in his action.

The appeal is allowed with costs, and the Magistrate's judgment altered to absolution from the instance with costs.

1926, August 17.

Kokstad.

FANELE vs. SHAI.

(Matatiele Case.)

Before J. M. Young, Ag. C.M., President, with W. G. Wright and R. D. H. Barry as Assessors.

Rebutting evidence—Plaintiff's right to lead where Defendant's evidence disclosed a defence of which plaintiff has no notice and as to which his witnesses have not been cross-examined.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Appellant sued Respondent in the Magistrate's Court in an action in which he claimed the return of a black gelding, of the value of £18, which he alleged the Respondent had spoliated from him. He also claimed the sum of £5 damages.

The Respondent in his plea alleged ownership.

The Magistrate therefore correctly allowed evidence as to ownership to be led.

After hearing evidence at considerable length, the Magistrate granted absolution from the instance with costs.

Against this judgment an appeal has been brought on the following grounds:—

- (1) That the judgment was against the weight of evidence;
- (2) That the judgment is contrary to law, in that the action being based on an act of spoliation and the Magistrate, having found himself unable to decide whether the horse in question belonged to Plaintiff or Defendant, must regard the horse as having been in Plaintiff's possession. Defendant admits that he took it from Masakala's Location, where Plaintiff lives, and there is nothing on the record to contradict the evidence for Plaintiff that the horse was in his possession. The Magistrate should therefore have ordered the Defendant to return the horse to Plaintiff.
- (3) Rejection of competent and admissible evidence in that the Magistrate refused to allow Plaintiff to call evidence in rebuttal of Defendant's allegations that the horse in question was one which had been paid to him as dowry.

With regard to the third ground of appeal, application was made by the Appellant's Attorney, at the close of the Respondent's case, for leave to lead the evidence of R. A. Asaele to rebut the evidence of Respondent to the effect that the horse in dispute had been paid to him as dowry. The Magistrate refused this application on the ground that the Appellant knew throughout the headman's inquiry and the case that Respondent claimed the horse as one paid to him as dowry, and that he had ample opportunity during the hearing to call any witnesses.

Rule 5, Sub-rule 3 (b) of Order XVII of Proclamation No. 145 of 1923 provides that "if the Plaintiff has not called any evidence (other than that necessitated by his evidence on the issues, proof whereof is on him) on any issues, proof whereof is on the Defendant, he shall have the right to do so after Defendant has closed his case. If he has called any such evidence, he shall have no such right."

The Respondent's plea amounted to a bare allegation of ownership, without disclosing how he acquired ownership.

In the course of the trial, the evidence for the defence revealed the fact that the horse had been paid as dowry by R. A. Asaele. No notice of this defence was given to Appellant, nor was any one of his witnesses cross-examined on this point. In the opinion of this Court, his application to rebut this evidence should have been granted. This being so, it is not necessary at this stage to consider the other points of appeal.

The appeal is allowed with costs, the Magistrate's judgment set aside, and the record returned to him, in order to afford Appellant the opportunity of leading this rebutting evidence.

1925, August 4.

Lusikisiki.

NYAMAZANA *vs.* MATSHETSHE.

(Bizana Case.)

Before W. J. Davidson, Magistrate, Lusikisiki, President
with H. S. Bell and R. C. E. Klette as Assessors.

*Pondo Custom—Gift and Apportionment—Whether there is
a difference—No formalities necessary.*

The facts of the case are immaterial.

JUDGMENT.

By President: At the request of Mr. Kottich the following points were placed before the Native Assessors, viz.:—

- (1) In native custom is there a difference between an apportionment and a gift?
- (2) If there is a difference, are the same or any formalities necessary when a gift is made by a father to a son?
- (3) If the father has already apportioned his property between his sons is any formality necessary when a gift is made by a father to a son?

They replied unanimously as follows:—

- (1) There is a difference.
- (2) No formalities are necessary if a *bona fide* gift is made without any sinister purpose such as the disinheritance of an elder son.
- (3) No formalities necessary.

This Court is of opinion that the Magistrate's finding was correct, that the mare was given as a gift to the Plaintiff and the Court is therefore not disposed to disturb his judgment on the claim in convention. In respect to the claim in reconvention the Defendant (Plaintiff in convention) in his plea denied that Plaintiff (Defendant in convention) owned any property at the kraal of Macunduva. In evidence, however, it was admitted that two horses in the possession of Macunduva were the property of Plaintiff in reconvention. He is therefore clearly entitled to an order for these two horses.

The appeal is dismissed with costs but the Respondent is ordered to deliver the two horses to the Plaintiff in reconvention.

1923, April 9.

Lusikisiki.

NQABENI *vs.* SIFUMBA.

(Libode Case.)

Before J. M. Young, A.C.M., President, with G. Jeffery and W. C. H. B. Garner as Assessors.

*Disinherison—Order of Court tantamount to, held irregular—
Diversion of property—Wife and heir to be consulted.*

*The relative facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Respondent sued the Appellant for

(a) An order on Appellant to remove forthwith from Respondent's kraal.

(b) An interdict restraining him, Appellant, from interfering with his, Respondent's property.

The Magistrate granted both these requests.

It is common cause that Appellant is the eldest son of the great house of Respondent; that after the death of Appellant's mother the Respondent married, by Christian rites, a woman named Gracie, with whom he has lived at the kraal established for Appellant's mother and by whom he has had six children.

The evidence discloses that there is a disagreement between father and son regarding the property of the house of the Appellant's mother. The Respondent contends that the Appellant is interfering with the property, whilst the Appellant's contention is that the Respondent is diverting property appertaining to the house of the first wife to that of the second.

Appellant in his plea asked for an order interdicting Respondent from placing property of his first wife's house in that of the second, but the Magistrate refused to make such an order, holding on the authority of *Mfenga versus Tshali* (1, N.A.C. 32) that Appellant could not during the lifetime of Respondent obtain such an order.

In the opinion of this Court the Magistrate was wrong in ordering the Appellant to remove from the Respondent's kraal. His action in so doing is tantamount to disinheriting the Appellant. His (Respondent's) proper course would seem to be to establish a kraal for his wife Gracie and place all stock belonging to her house at such kraal, leaving the stock belonging to Appellant's mother's house at the kraal where he now resides. By so doing he would not lose control of any of his property and if Appellant in any way interfered with the property left at such kraal he would be restrained from doing so.

It was held in the case of *Nonayiti Tshobo* and another *versus* *Soja Tshobo* (4 N.A.C. 140) that a man cannot divert the property of one house to another house without consulting the wife and heir of the house to which the property belongs,

and that a son cannot be disinherited except at a public meeting of relatives and after a report has been made to the Chief or Magistrate.

The appeal is allowed with costs and the Magistrate's judgment altered to "Judgment for Defendant with costs."

1923, August 21.

Kokstad.

MAMAKONTSA *vs.* SUTÀ.
(Mount Ayloff Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and H. E. Grant as Assessors.

Practice—Heir is the proper person to institute proceedings claiming property belonging to the Estate—Widow has no locus standi.

The facts are immaterial.

JUDGMENT.

By President: In the opinion of this Court the representative of the estate was not legally joined in the action instituted by the Plaintiff, now Appellant, a widow, who claims certain property in her late husband's estate, to which there is an heir.

Following the case of Dudumashe *versus* Kondile (4 N.A.C. 299), heard at Butterworth on 12th March, 1918, and previous decisions, this Court is of opinion that the Plaintiff is not entitled to institute this action.

The appeal is dismissed with costs.

1923, December 14.

Lusikisiki.

LUGULE *vs.* MAQALENI.
(Bizana Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and J. W. Mitchell as Assessors.

Deceased estate—Special plea—Will of no effect against heir according to Native Custom until lodged with and recognized by Master of Supreme Court.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff, now Appellant, sued the Defendant, now Respondent, for a declaration of rights and certain property on the ground that he is brother and heir to the late Makubalo, the deceased husband of the Defendant. To this claim the Defendant pleaded specially that the Plaintiff had no *locus standi in judicio* in respect of the estate of the late Makubalo, in that immediately prior

to his death the said late Makubalo executed a will appointing other than the Plaintiff to be his heir, guardian of his children and administrator of his estate.

The special plea was upheld in regard to the existing property in the estate. The only ground of appeal urged before this Court is that the Will having been retained by the widow and not lodged with the Master of the Supreme Court, as by law required, is inoperative.

It is alleged in the summons that the late Makubalo died during January, 1923. The will, however, is dated the 2nd February last. It is clear that no steps have been taken to transmit the Will to the Master in accordance with the imperative requirements of the law, and for this delay the Defendant, who claims under the will, is entirely responsible.

According to Native law and custom the Plaintiff is entitled to the order asked for and in the opinion of this Court the Will in question cannot deprive him of his clear rights without it having been properly lodged with and recognized by the Master of the Supreme Court.

The appeal will be allowed with costs and the judgment in the Court below amended to read special plea in bar overruled. The costs of appeal to come out of the estate.

1925, March 2.

Butterworth.

MAJIKI vs. SIGODWANA.
(Nqamakwa Case.)

Before J. M. Young, A.C.M., President, with O. M. Blake-way and R. D. H. Barry as Assessors.

Illegitimate son—Institution as Heir—Natural Father married according to Christian Rites.

The relative facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The late Mpini married Nosam according to Christian rites, but had no male issue by her. He had, however, an illegitimate son, Sigodwana, and paid a fine in respect of him. The Magistrate found as a fact that Mpini instituted Sigodwana as his heir with all the necessary formalities according to Native custom.

Mpini's eldest brother's eldest son, Joseph, applied to be declared heir to Mpini's estate.

The Magistrate found in favour of Sigodwana.

Joseph appealed, *inter alia*, on the ground:

"That as the late Mpini Majiki married his wife by Christian Rites is is opposed to principles of morality and good order to allow an adulterine son to succeed his natural father as heir and thus oust a legitimately born nephew who would otherwise succeed."

In the Opinion of this Court there is sufficient evidence on the record to support the Magistrate's finding. The appeal is dismissed with costs.

1925, March 14.

Umtata.

KOBUS *vs.* MZINDWANA.
(Tsolo Case.)

Before J. M. Young, A.C.M., President, with F. N. Doran
and R. C. E. Klette as Assessors.

*Jurisdiction of Magistrates' Courts—Validity of a will—
Section 37 (d), Proclamation No. 145 of 1923.*

The facts are sufficiently clear from the judgment of the
Native Appeal Court.

JUDGMENT.

By President: Respondent sued the Appellant in the
Magistrate's Court for an order declaring him to be the heir
under Native law to the estate of the late Stephen Adonis
Bangela and delivery to him of the assets in that estate.

Appellant objected to the summons on the ground that it
involved the question of the validity of the will of the late
Mary Bangela, surviving spouse of the late Stephen Adonis
Bangela, and that therefore the Magistrate had no jurisdic-
tion in terms of Section 37 (d) of Proclamation No. 145 of
1923.

In support of this objection Appellant led evidence to show
that Stephen Adonis Bangela died intestate and that the
sole assets in Mary Bangela's estate were derived from her
husband's estate.

It was contended that if the estate were administered
according to Common Law it would be dealt with in terms of
Mary Bangela's will and that, if it is not so dealt with,
Mary Bangela's will falls away as there would be no estate
to administer and that therefore Respondent was attacking
the right of Mary Bangela to make a will.

This contention is entirely fallacious, for Respondent is
not seeking specific property but a declaration that he is heir
to Stephen Adonis Bangela—not Mary Bangela—and he
claims the assets in Stephen Adonis Bangela's estate which
are being administered by Appellant as Executor Dative
whose duty it is to ascertain what are the assets in the estate
and distribute them subject to the Master's confirmation.
Respondent claims the assets which are to be so ascertained.
If, when the distribution account is framed, it is found that
assets belonging to the estate of Stephen Adonis Bangela
have been omitted and wrongly dealt with under Mary Ban-
gela's will as being her's a further action will become neces-
sary to vindicate these assets, but until this action is brought
it cannot be contended that Section 37 (d) of Proclamation
No. 145 of 1923 applies and in the opinion of this Court the
Magistrate correctly overruled the objection.

Respondent in paragraph (c) of his claim alleges that
Stephen Adonis Bangela and Mary Bangela were married out
of community of property, thereby implying that the latter

had no claim to any portion of the former's estate, but, as stated above, Respondent does not specifically claim any portion of Mary Bangela's estate and this allegation does not affect the position as it now stands. Whether married in or out of community there must be at least half of Stephen Adonis Bangela's estate for distribution to his heirs *ab intestato*. The wife cannot be heir to the husband *ab intestato* nor can her testamentary heir through her in the present case. Their rights are therefore not affected.

The citation of Appellant in his capacity as Executor Testamentary of Mary Bangela's estate and in his individual capacity as co-heir to the estate does not affect the position because Respondent is not claiming any portion of Mary Bangela's estate.

The appeal is dismissed with costs.

1925, August 5.

Lusikisiki.

SIBEKELA *vs.* KWETSHUBE & MAPONI.

(Ngqeleni Case.)

Before W. J. Davidson, Magistrate, Lusikisiki, President,
with H. S. Bell and R. C. E. Klette as Assessors.

Minor—Assistance of Mother as natural guardian—Repudiation of heir—Declaration of rights.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case Plaintiff, Kwetshube, assisted by his mother, Maponi, prayed for an Order declaring him to be the heir to the Great House of the Defendant, Sibekela, and for the apportionment of Defendant's estate.

Defendant objected to the summons on the ground that Plaintiff had no *locus standi in judicio* inasmuch as he alleged in his summons that he was the Defendant's minor son and consequently Defendant would be his guardian and his mother could not assist him until a *curator ad litem* had been appointed by a competent Court. In reply to this objection Plaintiff stated that as he (Plaintiff) alleged in his summons that as Defendant had repudiated his rights as son and heir he (Defendant) naturally repudiated the fact that he was Plaintiff's guardian and therefore he was properly assisted by his mother and natural guardian.

After argument the Magistrate over-ruled this objection and proceeded to hear the case. The prayer for the apportionment of the property was withdrawn.

The Magistrate granted an order declaring Plaintiff the eldest son and heir of the Great House of Defendant.

The Defendant appealed on the Magistrate's ruling on the objection and also his judgment.

The grounds of appeal were:—

- (1) That the objection taken by Defendant to Plaintiff's summons in regard to Plaintiff's judgment, status or right to sue, is well founded in law and in accordance with the Rules of Court.
- (2) That there is no proof of legal or valid marriage between Plaintiff's parents.
- (3) That the judgment is against the weight of the evidence and the probabilities of the case.

In the opinion of this Court the Magistrate's ruling on the objection is correct.

In respect to the further grounds of appeal there is abundant evidence on the record to prove there was a marriage between Defendant and Plaintiff's mother, Maponi. The appeal is dismissed with costs.

1924, March 6.

Umtata.

FIGLAN vs. FIGLAN.

(Xalanga Case.)

Before W. T. Welsh, C.M., President, with P. G. Armstrong and R. H. Wilson as Assessors.

Marital Power—Provisions of Section (5) Proclamation No. 142 of 1910 discussed—Wife cannot sue husband for property under his control.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff, now Respondent, sued her husband, now Appellant, to whom she was married out of community, for certain property which she alleged she possessed prior to her marriage or acquired subsequent thereto.

The Defendant excepted to the Plaintiff's summons on the ground that it disclosed no cause of action in that by virtue of the marital power vested in him he had the exclusive right of managing and administering the joint estate of the parties. This exception was overruled and judgment given for the Plaintiff for a considerable proportion of the property claimed or its value £30 and costs. Against this judgment the Defendant has appealed on the grounds—

- (a) that in terms of sub-section 2 of paragraph 6 of Proclamation 142 of 1910 the Plaintiff's claim is beyond the jurisdiction of the Resident Magistrate of this District;
- (b) that the judgment of the Court in dismissing the exception raised on the question of law was wrong;



- (c) that the judgment of the Court in ordering Defendant to restore the articles claimed in paragraph III of the Summons or pay their value (which was not proved) was wrong, because Plaintiff refuses to restore to Defendant conjugal rights and deserted Defendant without reasonable and probable cause and that therefore under the circumstances Defendant was justified in detaining the articles claimed until the Plaintiff returns to Defendant at his home.

The first ground has not been pressed.

Before this Court it is admitted that community of property was excluded by virtue of Section 5 (1) of Proclamation No. 142 of 1910 and that no Ante Nuptial Contract was entered into.

For the Appellant it is contended that as the marital power or authority has not been expressly excluded the exception should have been upheld. The Respondent contends, however, that the words "No marriage between natives celebrated within the Transkeian Territories upon or after the date of the promulgation of this Proclamation shall produce the legal consequence of community of property between the spouses" in Section 5 (1) of the Proclamation excludes not only community of property, but also the marital power of the husband over his wife's property brought into the marriage. With that contention this Court does not agree. In its opinion the meaning and intention of Section 5 (1) of Proclamation No. 142 of 1910 was to provide an automatic means by which community of property would ordinarily be excluded, but that this does not in any way limit a husband's marital power, which is a matter to be regulated by other means.

In the opinion of this Court the marital power not having been excluded the property in question is under the control of the Defendant and the exception should have been upheld.

The Appeal will be allowed with costs and judgment in the Court below altered to exception upheld with costs.

1924, March 4.

Umtata.

TAFENI *vs.* XEGWANA.

(Engcobo Case.)

Before W. T. Welsh, C.M., President, with P. G. Armstrong and R. H. Wilson as Assessors.

Judgment in an interpleader action does not operate as an Estoppel against persons who are not parties to the action.

Tafeni succeeded in an action against Abala Lamba and another and obtained judgment for 5 head of cattle or £25 and costs. A writ of execution was issued and certain cattle were attached in satisfaction of the judgment. Of these

cattle six were claimed by one Abel Rasmeni. An interpleader action resulted between Abel Rasmeni, the claimant, and Tafeni, the judgment creditor in the original suit. The Magistrate declared the six cattle executable with costs on 16th October, 1923.

On the 24th October, 1923, Abraham Xegwana, *alias* Rasmeni, brother of Abel Rasmeni, claimed 4 of the cattle which had been declared executable. Another interpleader action resulted this time between Abraham Xegwana and Tafeni.

A plea was filed by Respondent's Attorney that the cattle had already been declared executable and that the matter was *res judicata*. After trial the 4 cattle claimed were declared not executable and Respondent appealed.

JUDGMENT.

By President: In the opinion of this Court the matter is not *res judicata*. The parties are not the same and the previous claim was not made on behalf of the present claimant.

No direct authority has been produced to this Court laying down that in an interpleader action a decision that the property is executable prevents another claimant putting forward his claim by means of a later interpleader action, and in the absence of such a ruling this Court is not prepared to uphold the contention advanced on behalf of the Appellant. Indeed to do so might open the door to fraud and collusion to the detriment of *bona fide* claimants.

The Magistrate has believed the evidence adduced on behalf of the Claimant which is not contradicted, the previous record having been admitted with reservations. The Appeal is dismissed with costs.

1924, November 26.

Umtata.

TITSHALA *vs.* NOKAZI.

(Mqanduli Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and H. E. F. White as Assessors.

Procedure—Rescission of judgment—Mistake common to both parties.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In the original action the Respondent, Nokazi Dumezweni, who alleged she was a widow, which statement was not denied in the pleadings, sued the Appellant, Titshala Mange, in an action wherein she claimed a certain cow which she alleged he had disposed of without her consent. The Magistrate found in favour of the Respondent and entered judgment for her as prayed. A few

weeks thereafter the Respondent's husband, Dumezweni, who had been away and not heard of for 23 years returned and the Appellant thereupon took action to have the judgment recorded against him rescinded on the ground that the Respondent was and still is the wife and not the widow of Dumezweni, that her statement that she was a widow misrepresented a material fact and that he was thereby deprived of a defence which would otherwise have been available to him.

It is not clear whether the cow in question was the personal property of the Respondent or belonged to the estate of her absentee husband, so no good purpose will be served by exploring the possible defences which might have been set up in the latter event as it is apparently not necessary to show prejudice.

The Magistrate before whom this application came refused to rescind the original judgment and the Applicant has appealed to this Court on the grounds—

- (1) the representation that the Respondent was a widow, even though made in good faith, was admittedly wrong and such representation deprived the Applicant of a clear ground of defence and therefore seriously prejudiced him;
- (2) the Respondent's husband (Dumezweni) has no power to cure a defect in Respondent's summons by a ratification made subsequent to judgment in the original action and to the Appellant's application for a rescission on the ground of such defect.

In the original action the present Respondent's allegation that she was a widow was not challenged and it can therefore be accepted that it was a mistake common to the parties.

Section 36 (2) of the Magistrates' Courts Proclamation No. 145 of 1923, provides that the Court may rescind or vary any judgment granted by it which was obtained by mistake common to the parties.

Though a good deal of doubt existed previously as to how far Magistrates' Courts had power to set aside their own judgments, it seems clear that if the case can be brought within the terms of Section 36 these Courts may now set aside their own judgments.

In the opinion of this Court the present application falls within the terms of Section 36 (2), the mistake having been common to both parties. The appeal will accordingly be allowed, the proceedings in the Magistrate's Court subsequent to the filing of the summons will be set aside and the Appellant, Defendant in the Court below, is granted leave to defend the action, in accordance with the Rules, by way of exception or otherwise. There will be no order as to costs in the Court below, but the Respondent must pay the costs of appeal.

1924, December 12.

Lusikisiki.

MANDZENDZE *v.* QOLINTABA.
(Flagstaff Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson
and W. C. H. B. Garner as Assessors.

Procedure—Judgment—Application to rescind—Costs.

The facts are immaterial.

JUDGMENT.

By President: The application should have been made in terms of the Rule not later than one month after the Applicant had knowledge thereof and in the absence of proof to the contrary it must be presumed that he had knowledge of the judgment on the 28th June. The application to rescind was issued on the 6th August, for hearing on the 20th idem. The right to reopen having expired an extension of time should have been applied for and until that was granted it was not competent for the application to be entertained, *vide* Pier Street Mosque Trustees *versus* Abrahams (1922, E.D.L. 330). The rule regarding costs has also been disregarded.

In view of these irregularities this Court will under its powers of review set aside the application proceedings including the order as to costs, leaving it open to the Applicant to take such steps as he may be advised.

The costs of appeal must be paid by the Respondent on appeal.

1927, July 6.

Butterworth.

NTANGA *vs.* GXOGXA.
(Nqamakwe Case.)

Before W. T. Welsh, C.M., President, with R. J. Macleod
and G. D. S. Campbell as Assessors.

Practice and Procedure—Default judgment—Application to Rescind not timous—Absence of application for extension of time.

The Defendant made application on the 3rd March, 1927, in terms of Section 36 (1) and Order No. XXVIII (3) of Proclamation No. 145 of 1923, for an order rescinding a default judgment given against him on the 28th April, 1926, on the grounds that he was absent at work from September, 1925, to November, 1925, and while being aware of the proceedings taken against him by the Plaintiff, he was unable to leave his employment to defend the action. The application was dismissed and the Defendant appealed.

JUDGMENT.

By President: It was ruled by this Court in the case of Mandzendze Ncaba *versus* Qolintaba Nkumanda (*Supra*) following the decision in the case of Pier Street

Mosque Trustees *versus* Abrahams (1922 E.D.L. 330) that applications to rescind default judgments must be made within one month and that unless an extension of time had been granted, it was not competent for the application to be entertained.

The application states it was made in terms of Section 36 (1) of Proclamation No. 145 of 1923 and Order XXVIII (3) thereof.

The appeal is dismissed with costs.

1925, March 12.

Umtata.

JOYINI & MAQOBO *vs.* SIBONDA.
(Engcobo Case.)

Before J. M. Young, A.C.M., President, with F. N. Doran
and R. C. E. Klette as Assessors.

Rescission of judgment on ground of fraud—What must be proved.

The relevant facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellants instituted an action against Respondent to show cause why the judgment given by the Magistrate's Court of Engcobo in the case of Sibonda Ngxiya *versus* Joyini Gola and Maqoba Gola on the 7th February, 1924, should not be set aside on the ground that the said judgment was obtained by fraud.

The Magistrate after hearing the evidence adduced entered a judgment of absolution from the instance with costs holding that Appellants had failed to prove that the evidence on which the judgment had been obtained was false.

With this finding this Court sees no reason to disagree.

In the case of Rex *versus* Solomon (T.S. 1905 711) INNES, C.J., stated that the Court must be satisfied that the evidence was false, and that the judgment was obtained upon such false evidence.

In the case of Childerly Estate Stores *versus* Standard Bank of South Africa, Limited, heard in the Orange Free State Provincial Division on 28th March, 1924, it was held that the Plaintiff's case was reduced to a single issue of fraud and in order to succeed he must prove—(1) that the Defendant Bank gave incorrect evidence at the first trial; (2) that he did so fraudulently and with intent to mislead the Court; and (3) that such false evidence diverged from the true facts to such an extent that the Court would, if it had known the true facts, have given a judgment different from the judgment which it was induced to give by such false evidence; that, on consideration of the evidence, the allegations of fraud and intention to mislead were not proved.

The appeal is dismissed with costs.

1925, December 5.

Kokstad.

MCISI *vs.* MYAKAYAKA.

(Matatiele Case.)

Before W. T. Welsh, C.M., President, with R. D. H. Barry
and F. E. G. Munscheid as Assessors.

Consent judgment—No appeal therefrom.

In answer to Plaintiff's summons Defendant filed a plea which raised three legal points. The Magistrate having ruled on these points adversely to the Defendant he consented to judgment being entered in favour of the Plaintiff. Thereafter he (Defendant) noted an appeal against this judgment.

JUDGMENT.

By President: Mr. Elliot on behalf of the Respondent objects *in limine* to the appeal being heard on the ground that the judgment was one to which the Appellant had consented and that he is bound thereby.

According to the record it is clear that the Appellant's Attorney consented, without any reservation whatsoever, to the judgment recorded. In the opinion of this Court it is not competent to appeal against this judgment and the objection is accordingly upheld with costs.

1926, July 12.

Umtata.

TSHACILE *vs.* BALNATI.

(Engcobo Case.)

Before J. M. Young, Ag. C.M., President, with R. H. Wilson
and G. M. B. Whitfield as Assessors.

Judgment—Varying or setting aside of, on ground of fraud or mistake common to parties—Applicability of time limit imposed by Rules 1, 2 and 3 of Order XXVIII, Proclamation No. 145 of 1923.

The relative facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In an action in the Magistrate's Court at Engcobo, Appellant claimed 5 head of cattle or £25, their value, as damages for adultery committed by Respondent with his wife at divers times and places, but more particularly about December, 1924.

Appellant admitted liability on the summons and particulars of claim and consented to judgment, which was entered on the 5th May, 1925.

On the 4th December, 1925, Respondent issued a summons in the same Court praying for the judgment of the 5th May, 1925, to be set aside to the extent of two head of cattle or their value £10, and claiming a refund of two head of cattle, or their value, upon the ground of mistake common to the parties, or alternatively, on the ground of fraud.

The case was first heard on the 4th February, 1926, but postponed to the 13th April, 1926, and in the meantime the Appellant's wife gave birth to a child on a date between the 24th and 28th February, 1926.

Although no objection was raised in the Magistrate's Court it was urged on appeal that the Magistrate had no power to hear the case or vary the judgment in question in the circumstances of the case, more particularly as Rules 1, 2 and 3 of Order XXVIII of Proclamation No. 145 of 1923 had not been complied with, the period prescribed under the Rules having elapsed.

This argument cannot be upheld, as the order in question lays down the procedure to be followed in applications under that Order and does not apply to actions by summons. The procedure adopted in this case is by summons to vary the judgment; and, in addition a refund of the two head of cattle or their value £10 is claimed.

In the case of *Meintjes versus Theunissen* (10 E.D.C. 55) it was held that a Magistrate could set aside a judgment granted under a complete misconception of the facts, and in the case of *Soni versus Singh* (1918, T.P.D. 440), it was laid down that, although under the Order XXI of Act No. 32 of 1917 (Order XXVIII of Proclamation No. 145 of 1923) a judgment may be set aside upon application, this was only permissive and not compulsory, and where the ground is fraud, or where there is a claim for additional relief, besides the setting aside of the judgment, as in this case, the more appropriate method is by summons to set aside.

It appears, therefore, that the correct procedure was adopted in this case, and, in the opinion of this Court, the appeal should not be allowed.

Although Rule 3 of Order XXVIII provides that the Rules contained in that Order shall *mutatis mutandis* apply to any judgment which may, under Section 36 of the Proclamation, be rescinded or corrected by the Court, this Court is of opinion that it was never the intention to debar a party against whom a judgment had been obtained by mistake common to the parties or by fraud, from seeking redress, unless he did so within a month of his becoming aware of the judgment. Such an interpretation would amount to an absurdity, as it is conceivable that the mistake or fraud might not or could not possibly be discovered until months after the judgment had been pronounced.

In his judgment, the Magistrate has omitted to order the refund of the two cattle or their value, although these were claimed in the summons. In dismissing the appeal with costs, this Court, under the provisions of Section 77 of Proclamation No. 145 of 1923 amends the Magistrate's judgment to read:—

The judgment in case No. 183 of 1925 is set aside to the extent of two head of cattle or £10, and the Defendant is ordered to restore to Plaintiff two head of cattle, or pay their value £10. Defendant to pay costs.

1926, July 15.

Umtata.

SIXONGOLWANA AND ZISOYI *vs.* NTAKA.
(Umtata Case.)

Before J. M. Young, Ag. C.M., President, with W. J. Davidson and G. M. B. Whitfield as Assessors.

Estoppel—Kissing of headman's hand by successful party constitutes acceptance of headman's award—Headman's messenger sent to carry out order is not successful party's agent, and as soon as he removes stock from judgment debtor's kraal, latter is relieved from further liability.

The relevant facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case Respondent claimed £15 cash as damages for adultery committed by the first Appellant with his wife, the second Appellant being head of the kraal and liable for the torts of the first Appellant.

The adultery was admitted but a plea of payment was filed.

It appears that the Respondent brought this action under Native Custom before the headman and obtained judgment for three head of cattle, and thereafter Appellants paid the headman's messenger two head of cattle and ten goats in full settlement and these were accepted and removed by him. Upon Respondent sending for the stock, the messenger refused to deliver them until a beast was paid to him as a fee (Mvuzo). The Respondent declined to pay the fee demanded and offered payment of a goat or 10s. This was not accepted and the stock was left at the messenger's kraal.

The Court is satisfied that after judgment had been given in his favour, the Respondent kissed the headman's hand.

The facts having been put to the Native Assessors, they state:—

- (1) When a case is heard by a chief or headman and judgment is given, if the successful party kisses his hand, this constitutes an acceptance of the award in his favour. If he is dissatisfied he does not kiss the hand but states he is appealing.

- (2) If the chief or headman sends a messenger (Msila) to carry out the order, the messenger is not the successful party's agent, but remains the messenger of the chief or headman.
- (3) As soon as the stock is removed from the kraal of the judgment debtor by the chief or headman's messenger, the debtor is relieved of all further liability even if the messenger accepts less than the amount awarded. The fee to be paid by the successful party is within the discretion of the chief or headman.

While the Respondent was clearly entitled to bring an action and claim damages in cash, he elected to proceed with his claim before the headman under Native Custom, and having kissed his hand he thereby accepted the award. Further, the stock paid in satisfaction of the award having been removed from the Appellant's kraal by the headman's messenger, they are released from all further liability to Respondent.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Defendants with costs.

1927, August 15.

Kokstad.

FANA *vs.* MAWALA.

(Unzinkulu Case.)

Before W. T. Welsh, C.M., President, with F. E. H. Guthrie and E. W. Bowen as Assessors.

Headman's award—Handing over of cattle to headman's messenger in settlement of award constitutes delivery—No distinction in principle between symbolical delivery of cattle in payment of dowry and in settlement of headman's award.

JUDGMENT.

By President: In this case the Plaintiff sued the Defendant for 2 cattle or £10 which he alleged was the balance of an award made in his favour by Headman Pata in an action wherein the Defendant had been charged with adultery. The Defendant in his plea admitted that judgment had been given against him for 3 cattle and that he and Plaintiff had acquiesced in this award.

The evidence shows that the Headman's messenger was duly instructed to carry out the terms of the judgment.

The Defendant at his kraal handed over a horse and calf to the headman's messenger. The horse was delivered to the Plaintiff, but the calf was left at the kraal with the Defendant's brother, Nqayivane, with instructions to look after it.

from the kraal of Luruwa Manyane, the judgment debtor. With the exception of two head of cattle, all the property attached was handed over to Mamosa Manyane on the 27th April, 1925, and on the 11th May, 1925, Lefana Phetha issued an interpleader summons against Mamosa Manyane, claiming one grey stallion and one red and white cow as being his property, and not executable.

The Magistrate, after hearing the evidence, entered judgment in the following terms:—

“ Judgment entered for Respondent with costs, the horse being declared executable, and judgment entered for restoration of cow with costs—the cow being declared not executable.”

On application being made to the Magistrate for his reasons for awarding costs to Respondent in regard to the horse, which had been declared executable, he altered his judgment to read as follows:—

“ Horse declared executable with costs. Cow declared not executable. No order as to costs.”

Against this order an appeal and cross-appeal have been noted.

The appeal is brought on the grounds that the Magistrate did not exercise a judicial discretion in making the award he did in regard to costs, and further that it was not competent for him to alter his judgment on receipt of a request for his reasons.

The cross-appeal is against the Magistrate's finding in respect to the cow, the grounds being that this portion of his judgment is against the weight of evidence and is not in accordance with the principles of law deducible therefrom. Further, that the cow, having been attached in the possession of the judgment debtor, the Claimant had not discharged the onus resting on him.

With regard to the alteration of his judgment by the Magistrate, this Court is of opinion that, in view of the provisions of Section 36 of Proclamation No. 145 of 1923, and Order XXIX, it was not competent for him to do so, and on this point the Appellant must succeed.

Coming to the cross-appeal, the Cross-Appellant maintains that both the original and the amended judgments declaring the cow not executable are not supported by the evidence and not in accordance with the principles of law.

The cow in question was attached in the possession of the judgment debtor, and it therefore became the duty of the Claimant to prove conclusively that it was his property and not executable.

After a very careful consideration of the Magistrate's reasons and the evidence, more particularly that of the judgment debtor, who states, *inter alia*: “ Ill-feeling was created between myself and the woman through this action, and still

exists. I am out to see the woman does not get satisfaction," this Court is satisfied that Claimant has failed to discharge the onus resting on him.

The cross-appeal is allowed with costs, and the Magistrate's judgment altered to read:—"The horse and cow are declared executable. Claimant to pay costs."

This disposes of the appeal in so far as it affects the Magistrate's order in regard to costs.

There will be no order as to costs on the appeal.

1926, December 2.

Lusikisiki.

GUBUDU *vs.* KEHLE.

(Ngqeleni Case.)

Before W. T. Welsh, C.M., President, with E. W. Bowen and H. M. Nourse as Assessors.

Judgment by consent—Settlement between parties—Departure by Magistrate from terms of settlement in recording formal judgment.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case Plaintiff sues Defendant for five head of cattle or their value £25 paid by one Nonini Mlozi as damages for adultery with, and subsequent pregnancy of, a woman named Mangubasi *alias* Nomgwini. The Plaintiff bases his claim on the allegation that Mangubasi was his wife.

Defendant admits the receipt of the cattle paid as damages by Nonini but disputes Plaintiff's rights thereto.

In 1922 certain litigation (Ngqeleni Case, 139/1922) ensued between the present Defendant and one Masabane respecting the guardianship of the woman Mangubasi above referred to. As a result of consent between the parties the then Magistrate of Ngqeleni noted on the record the following:—

"Defendant consents and Plaintiff accepts judgment for eight head less two paid. Defendant to keep the girl—Mangubasi—and her dowry."

Mangubasi was at that time in the custody of and under the control of the Defendant—Masabane.

In recording his formal judgment in case No. 139/1922 purporting to give effect to the terms of consent the Magistrate departed somewhat from the terms of the settlement arrived at as set out above. His judgment reads:—

"Judgment for Plaintiff (Kehle) for eight head or £40 less two head or £10 paid on account. The Defendant (Masabane) to become entitled to the girl (Mangubasi) and her dowry. Defendant to pay costs."

Whilst, therefore, the original terms of consent provided that Masabane was "to keep the girl and her dowry" the formal judgment only set out that Masabane was "to become entitled to the girl and her dowry."

The difference in expression may be arguable, but in the opinion of this Court the crux of the matter lies in the actual terms of consent. Any judgment subsequent thereto could only be for the purpose of giving effect to that consent, and no departure from the terms and conditions arrived at between the parties themselves would be permissible.

According to that consent, in the opinion of this Court, it is clear the then Defendant (Masabane) was to retain the girl Mangubasi.

Such being the position the Defendant in this action (Kehle) lost any right he may have possessed in Mangubasi, and Masabane became entitled to give her in marriage in due course.

After a full consideration of the evidence this Court is satisfied she was duly married by Masabane to the present Plaintiff Gubudu, and that Gubudu is therefore entitled to damages paid for her pregnancy consequent upon adultery committed with her.

The appeal will be allowed with costs. The finding in the Court below is set aside, and judgment therein entered for Plaintiff (Gubudu) for five head of cattle or their value £25, and costs.

1923, July 20.

Butterworth.

SIDELO & HUWA *vs.* SILIMELA.

(Kentani Case.)

Before W. T. Welsh, C.M., President, with R. D. H. Barry and G. D. S. Campbell as Assessors.

Practice—A provisional judgment against a kraalhead is appealable.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case Silimela Ntantiso, the Plaintiff, now Respondent, sued Sidelo Huwa, together with Huwa Kulati, now Appellant, for five head of cattle or £25 for damages, alleging that Sidelo Huwa had committed adultery with his wife; and that the Appellant, Huwa Kulati, was the kraal head and thus responsible for the torts of the said Sidelo Huwa.

At the hearing Sidelo Huwa was in default, but the Appellant appeared, and his attorney pleaded that he was not responsible as kraal head, as Sidelo did not reside at his kraal.

The issue thus raised was dealt with and after hearing evidence the Magistrate entered judgment in the following terms:—

“ Provisional judgment for 5 cattle or £25 and costs against both Defendants jointly and severally, the one paying the other to be absolved.” Against this judgment the Appellant has appealed on the ground that the Magistrate erred in holding him liable for the torts of Sidelo, in that the evidence did not support the finding that the latter resided with him.

Before this Court the Respondent's attorney objected to the appeal being heard on the ground that the judgment appealed against is a provisional one and therefore not appealable.

According to the case of Jobela Sikila and another *versus* M. Govana, heard at Umtata in March, 1919 (4, N.A.C. 280) and numerous previous decisions the Magistrate rightly made the judgment a provisional one against both Defendants.

As has been pointed out by this Court on various occasions the joining of a kraal head in an action against a tortfeasor is permissible only because it is a feature peculiar to native custom which is not recognized under the common law. The question under consideration was dealt with by this Court in the case of Monqamele and others *versus* Francis Mazinyo (3 N.A.C., p. 212), which was followed in the case of Jakeni Mdingi and another *versus* Joe Wadonise, heard at Umtata in November, 1919 (4, N.A.C. 178) and in the case of Kutshuza *versus* Lunyeni and 5 others, heard at Umtata in April, 1920 (4 N.A.C. 180) where the Court held that the issue was final and so appealable. In the course of its judgment in the earlier case, the Court pointed out that the issue on the point of kraal head responsibility could not be a provisional one as the appealing Defendant had appeared and contested the point. The reasoning in this case is consistent with the decision of this Court in the case of Bango *versus* Kwekwe and Mjacu (2 N.A.C., p. 107), where the Court said, “ it is only a very peculiar provision of native law which renders an otherwise innocent person responsible for the torts of another simply by reason of the fact that he is what is commonly known as the kraal head of that other person.”

The Magistrate was required to find on two issues, firstly whether the alleged tortfeasor had committed the offence with which he was charged, and secondly whether the Appellant was his kraal head and thus liable for any damages awarded. Though the form of the judgment is provisional, this Court is of opinion that in substance and effect it is a final one on the question of kraal head responsibility which was the sole issue between the Appellant and the Respondent.

The objection to the hearing of the appeal will be overruled with costs. On the merits of the appeal this Court is of opinion that there is sufficient evidence on the record to support the Magistrate's finding and the appeal is dismissed with costs.

1923, November 21.

Butterworth.

NDAMEDAMA AND YOKWE *vs.* NGXABANO.

(Kentani Case.)

Before J. M. Young, A.C.M., President, with R. D. H. Barry
and R. J. Macleod as Assessors.

Kraal-head responsibility—If tort committed during residence of tort-feasor with kraal-head liability continues after tort-feasor's departure from kraal.

The facts are sufficiently clear from the following judgment.

JUDGMENT.

By President: The appeal in this case is brought on the ground that the first Defendant, having left the kraal of the second Defendant and established a kraal of his own subsequent to the commission of the tort complained of, the second Defendant is not liable for the tort.

In the opinion of this Court, the Magistrate was correct in holding that, under Native Custom, the second Defendant, who is head of the kraal of which the first Defendant was an inmate at the time the adultery was committed, is liable. The appeal is dismissed with costs.

1924, July, 16.

Umtata.

KAWU *vs.* MEJI.

(Mqanduli Case.)

Before J. M. Young, A.C.M., President, with W.
Carmichael and F. N. Doran as Assessors.

Tort—Death of tort-feasor before demand for damages made—Liability of kraal-head on admission that tortious act was committed whilst tort-feasor was an inmate of his kraal.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff in the Magistrate's Court sued Defendant for five head of cattle or their value, £25, as damages and alleged Cekana Qageni, who at the time, was an inmate of the kraal of Defendant and who has since died, seduced and made pregnant Nomlokazi, the Plaintiff's daughter.

After evidence had been led on the question whether any demand had been made on Defendant before the death of Cekana, it was found that no report had been made until after the death of Cekana, but admitted that Cekana had seduced

and caused the pregnancy of Nomlokazi, that at the time he was an inmate of the kraal of the Defendant, and that the Defendant is not the heir or administrator of his estate and has received no benefit from the estate. The Magistrate was asked to rule whether, in these circumstances, Defendant could be held liable for damages.

The Magistrate, on the authority of Nzwani Mayekiso *versus* Petros Sifuba (3 N.A.C. 247) held that the death of the seducer does not relieve the kraal head of his responsibility and entered judgment for Plaintiff as prayed.

On the question being referred to the Native Assessors they express the opinion that where the seduction is proved either by the admission of the kraal head or by the customary report of the seduction the kraal head is liable even after the death of the seducer and even if he left no property. This opinion is in agreement with that given by the Assessors in the case above quoted and is accepted by this Court.

The appeal is dismissed with costs.

1924, July 17.

Umtata.

SISUSE *vs.* MXATULE.

(Xalanga Case.)

Before J. M. Young, A.C.M., President, with W. Carmichael and F. N. Doran as Assessors.

Contract—Performance of—Transfer of surveyed allotment—Jurisdiction.

The relative facts are clear from the judgment of the Native Appeal Court.

JUDGMENT

By President: In this case the Plaintiff (now Respondent) sued the Defendant (now Appellant) for a sum of £56, the balance of the purchase price of certain building and arable allotments in the Xalanga District. It is common cause that an agreement was arrived at for the sale of these properties for the sum of £120 and that Plaintiff promised to take the necessary steps to give transfer upon receipt of an instalment of £64, that this sum was duly paid and that these steps have not yet been taken. Defendant contends that he has paid other sums amounting in all to £105. 12s. 2d. leaving a balance due of £14. 7s. 10d. He claims in reconvention an order of Court compelling Plaintiff to give transfer on payment of this balance. The Magistrate seems to have had considerable difficulty in arriving at a judgment on the facts and also ruled that he had no jurisdiction to grant any order in respect of the land and gave absolution from the instance on the claim and dismissed the claim in reconvention.

An appeal has been brought against the dismissal of the counterclaim. There is sufficient evidence to warrant the following payments being credited to the Defendant:—

Cash	£20	0	0
6 Cattle at £6	36	0	0
21 Goats at 10s.	10	10	0
1 Kapater	1	0	0
1 Horse	13	0	0
1 bag of Kaffircorn	0	15	0
Amount paid to Reuben			
Mkumatela	12	0	0
Clothing	3	5	6
Taxes	2	16	8
Total	£99	7	2

leaving a balance due to the Plaintiff of £20. 12s. 10d.

With regard to the question of jurisdiction the Defendant does not ask for an order on the administrative authorities but merely for an order on the Plaintiff to carry out the terms of his contract and take the necessary steps to obtain the approval of those authorities to the transfer. Such an order was within the jurisdiction of the Court to issue.

The appeal is allowed with costs and the Magistrate's judgment altered to Judgment for Plaintiff in reconvention with costs, as against Defendant in reconvention who is ordered to take the necessary steps to seek approval of transfer upon payment of the balance due on the purchase price viz:—£20. 12s. 10d.

1924, July 17.

Umtata.

MBULAWA *vs.* BUNGE.
(Mqanduli Case.)

Before J. M. Young, A.C.M., President, with W. Carmichael and F. N. Doran as Assessors.

Contract—Performance of—Transfer of arable allotment in unsurveyed district—Judicial and administrative function distinguished.

The facts are immaterial.

JUDGMENT.

By President: In this case the Plaintiff (now Appellant) asked for an order of Court compelling Defendant to take the necessary steps for the transfer to him of an arable allotment in terms of a contract concluded between them, or alternatively for damages for breach of this contract.

Exception was taken to the summons on the ground that the land is vested in the Crown and that a dispute in regard to it cannot be settled judicially but only administratively.

The Magistrate upheld the exception and dismissed the summons holding that the claim was a matter purely for administrative disposal. In support of his judgment he

quotes the decision of this Court in the case of *Dlomo versus Dlomo* (4, N.A.C. 181). But that case merely ruled that a Magistrate's decision in a land dispute could not be the subject of judicial review and has no bearing upon the present case which is not a "real" action or one for a declaration of rights to the land but a "personal" action for the carrying out of the terms of a contract.

There would have been nothing illegal in a contract for the transfer of the land in question and the contract might have included an implicit or explicit understanding that the necessary steps should be taken to seek magisterial approval of the transfer. It would, however, have been impossible for the Magistrate sitting administratively to give a judgment, legally enforceable, for damages for failure to carry out the terms of the contract and the Plaintiff could in such a case only obtain redress by coming to a Court of Law.

The appeal is allowed with costs, the Magistrate's ruling altered to dismissal of the exception with costs and the case returned for trial upon its merits.

1925, April 1.

Kokstad.

MKUBISO *vs.* SMOLWANA.
(Matatiele Case.)

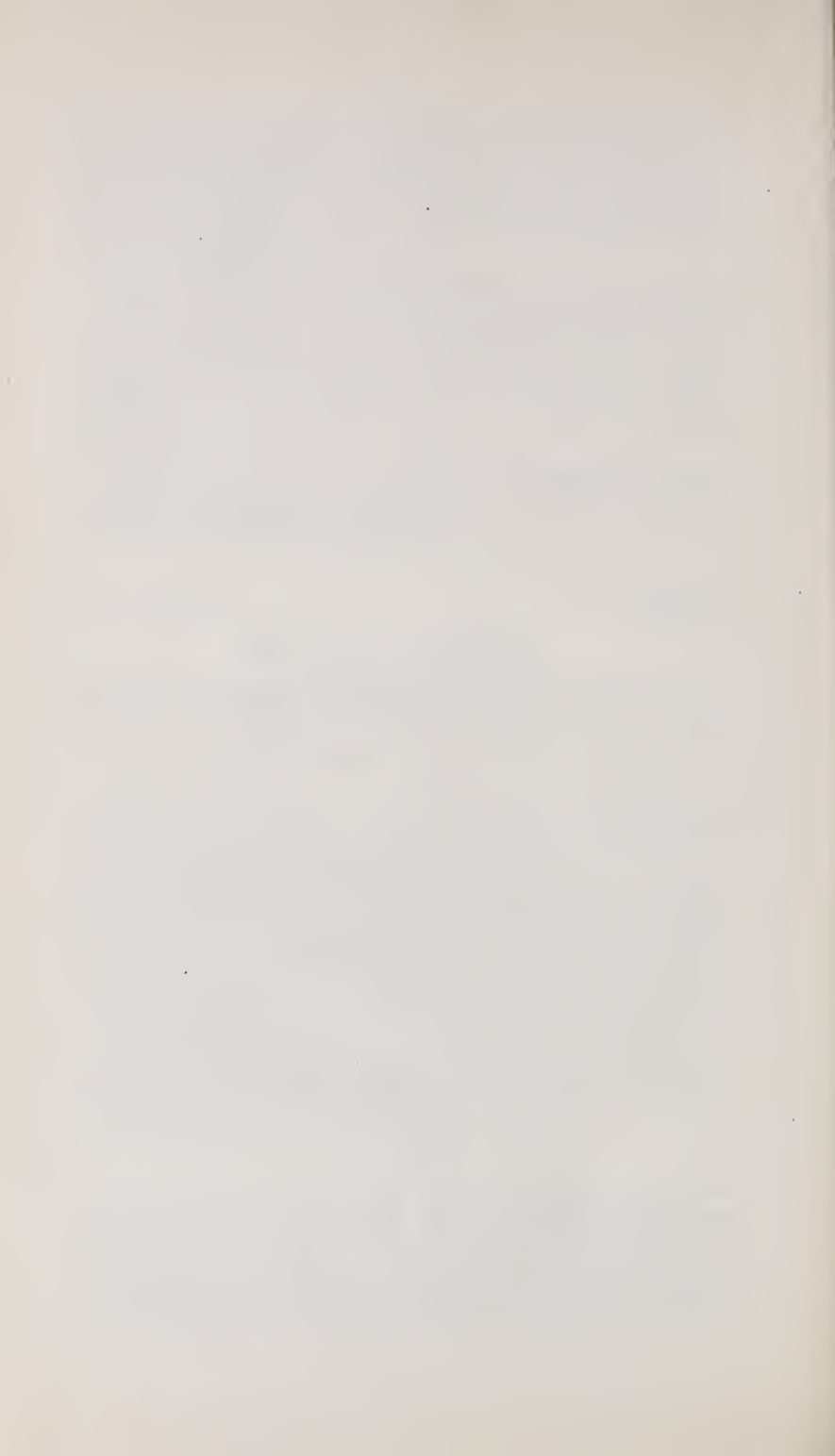
Before W. T. Welsh, C.M., President, with F. H. Brownlee
and H. E. Grant as Assessors.

*Kraal site—Death of Allottee—Improvements—Sections 9 and
10, Proclamation No. 143/1919—Widow's Rights.*

Plaintiff was the widow of the late Nodange Mkubiso. Some 2½ years after the latter's death Plaintiff left the locality of the kraal (which she had never had re-allotted to herself) and placed Defendant in charge of the kraal. She did not obtain the Magistrate's sanction to this nor had she ever obtained his permission to leave her improvements on the site. Plaintiff alleged that Defendant thereupon secured the allotment of the site to himself and she sued him for certain door-frames, beams, thatch-grass, etc., or their value £8, and £5 damages and costs. Defendant excepted to the claim on the ground that on the death of Nodange the allotment was *ipso facto* cancelled and the improvements should have been removed within three months of this date (*vide* Sections 9 and 10 of Proclamation No. 143 of 1919). The Magistrate upheld the exception and dismissed the summons. Plaintiff appealed.

JUDGMENT.

By President: It is clear that the Plaintiff was never granted the lot in question and that the property claimed has at no time vested in her. She therefore had no right whatever to place the Defendant in possession of either. She took no steps to avail herself of the provisions of Section 9 (2) of Proclamation 143 of 1919, whereby she could have secured the re-allotment of the site to herself; on the contrary she



left the locality and was absent for one and half years. Whatever the meaning and intention of Section 10 of the Proclamation may be this Court is of opinion that it does not confer greater rights upon the Plaintiff than it did upon her husband the allottee, whose common law rights were curtailed by Section 10. The appeal is therefore dismissed with costs.

1926, March 16.

Butterworth.

MOUNTAIN *vs.* NOLAYI AND NKWENKWE.

(Idutywa Case.)

Before W. T. Welsh, C.M., President, with F. H. Brownlee and W. F. C. Trollip as Assessors.

Lands—Original grant cannot be set aside without clearest proof of fraudulent or illegal acquisition of title—Proclamation No. 227/1898.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Plaintiff in the Court below, now Appellant, claimed from Defendants, now Respondents, the cancellation or amendment of certain title-deeds in respect of a building and arable allotment in the Idutywa District registered in the name of the first Defendant, and alleges:—

- (1) that he is the eldest son and heir in the Great House of the late Bangiso Sangqu and Headman of Sangqu's Location in the District of Idutywa;
- (2) that Defendant first-named is the widow of the late Bangiso Sangqu in the Qadi House of the Great House and Defendant second-named is the heir in that House
- (3) that the late Bangiso Sangqu's Great Wife, Noenti, the mother of the Plaintiff died about Rinderpest time and Defendant first-named being the Qadi Wife of the Great House assumed the position of a mother in the Great House and remained at the Great Kraal, which is the kraal of which she is in occupation at the present time together with Defendant second-named;
- (4) that this kraal being the Great Kraal, Plaintiff is entitled thereto as well as to the arable allotment thereunto appertaining;
- (5) that in disregard of the legal rights of the Plaintiff as his great son, the late Bangiso Sangqu, unknown to Plaintiff, and without any public act or procedure of disinherison, caused the kraal in question, his (Bangiso Sangqu's) Great Kraal, to be registered in the name of the Defendant first-named, she

being an "Iqadi" wife of the Great House and not the Great Wife. Plaintiff therefore claims (subject to the approval of the Chief Magistrate of the Transkeian Territories) the cancellation of the title-deeds of the said building and arable allotments Nos. 14 and 392, registered in the name of the Defendant first-named and/or the amendment thereof and/or the registration and/or the transfer thereof to his name, and tenders to surrender, if necessary, his title in and to the building and arable allotments at present standing registered in his name in Sangqu's Location in the District of Idutywa.

To this claim Defendant excepted on the grounds that it disclosed no cause of action in that:—

- (1) it does not allege that the first-named Defendant obtained the property mentioned in the said claim either by fraud or *justus error*;
- (2) the first-named Defendant is a grantee of the said property under the provisions of Proclamation 227 of 1898 as amended, that the grant was therefore a gift from the Government of the Union of South Africa to her, and no cause is disclosed in the summons why such gift should be set aside;
- (3) the summons does not allege any infringement of the Plaintiff's rights by an overt act by the second-named Defendant.

The exception was upheld by the Magistrate who ruled that no action lay without an allegation of fraud or *justus error*.

Against this decision the Plaintiff has appealed.

Proclamation 390 of 1906 extended the provisions of Proclamation 227 of 1898 to the District of Idutywa. This authorized officers appointed for the purpose to frame lists of claimants and in due course titles were issued to such as were approved, thus terminating the operation of Proclamation 125 of 1903, which had previously governed the occupation by natives of Crown Land in the District of Idutywa. Whatever rights to land the late Bangiso may have had, the effect of the application of Proclamation 227 of 1898 was to determine them when he and other approved claimants received titles to such grants as were made to them.

It is common cause that the first Defendant is the original grantee of the arable and homestead sites now in question.

No authority has been produced to this Court in support of the argument that an original grant of land by the Crown can be set aside in the manner claimed, whereas it has been authoritatively decided that the presumption of ownership in favour of the registered holder of land is so strong that only the clearest proof of fraudulent or illegal acquisition of title can prevail to upset it, and that in the absence of mistake or fraud, a final document, such as a grant, must speak for itself.

Without an allegation of fraud or mistake it would not be competent for the Plaintiff to substantiate his contention by evidence. In these circumstances this Court is of opinion that

the Plaintiff has shown no cause of action against the first Defendant, in whose favour the title-deeds in question were issued, nor against the second Defendant.

The appeal will accordingly be dismissed with costs.

1927, July 22.

Umtata.

MAVAYENI *vs* MAVAYENI.
(Umtata Case.)

Before W. T. Welsh, C.M., President, with R. H. Wilson and F. N. Doran as Assessors.

Surveyed kraal allotment—Use and occupation of after decease of registered holder, who during his lifetime contracted three marriages by Christian Rites—Respective rights of widow and heir of deceased, who is issue of first marriage—Rights of inheritance—Section 9 (1) Proclamation 142 of 1910 does not limit the use and occupation to a widow who had been the deceased's only wife during his matrimonial career—Deceased's heir cannot be ejected by widow in absence of good and sufficient cause therefor—Proclamations 227 of 1898, 16 of 1905, 142 of 1910 and 187 of 1921.

JUDGMENT.

By President: In this case the Plaintiff in reconvention in the Court below, now Respondent, alleged that the Defendant in reconvention had illtreated her and driven her away from her kraal and generally interfered with her rights and disposed of the property of the joint estate of herself and her late husband and that his presence at her kraal was intolerable, and she accordingly sought an order that he be required to leave her kraal and be restrained from interfering with her or her affairs. The Defendant denied the Plaintiff's allegations and stated that it was the Plaintiff who wished to remove from the kraal and take with her property to which she had no right. He denied the Plaintiff's right to eject him from the surveyed kraal site, claiming that he is heir thereto and is entitled to live there representing his late father as head of the kraal and administrator of the estate. The Magistrate declared the Plaintiff entitled to the sole occupational rights of the site in question and ordered the Defendant to remove therefrom within three months.

It is admitted that the kraal site, the subject of dispute, was granted to Defendant's father, the late Joel Mavayeni, under the provisions of Proclamation No. 227 of 1898, and is still registered in his name, that at his death the Plaintiff was his sole wife, that at the time of the latter's marriage the Defendant and his sister were residing at this kraal with their father and that the Defendant has no kraal site of his own having failed to take up one duly surveyed for him at the time of survey.

The evidence establishes that the late Joel Mavayeni, in succession, married three wives by Christian or Civil Rites.

By the first marriage there were two children, the Defendant and his sister Betty. By the second marriage a daughter, Mabel, was the only issue. Both Betty and Mabel are still living. There was no issue from the third marriage contracted with the Plaintiff who is the surviving widow of the late Joel Mavayeni.

The Defendant has appealed against the order made by the Magistrate and in elaborating the very meagre and somewhat inadequate grounds stated in his Notice of Appeal contends that the surviving widow was not at all times the sole wife of the deceased within the meaning of Section 9 (1) of Proclamation No. 142 of 1910 and is therefore not entitled to the exclusive use and occupation of the immovable property in issue, and accordingly has no right to eject him, he being the son and heir of the deceased holder.

Before dealing with the occupational rights of the parties it is necessary to determine whether the Plaintiff, who was the third wife of the deceased holder, is such a widow as is contemplated by Section 9 (1) of the Proclamation.

By Section 23 (c) of Proclamation No. 227 of 1898 it was provided that a widow would be entitled to the use of an allotment only when the deceased holder had left no sons or male descendants of such sons, but this was altered by Proclamation No. 16 of 1905 which enacted that any widow of a deceased registered holder recognized as such by law or Native Custom would have the use and occupation of his allotment and that only upon her death or remarriage could the heir succeed thereto. The latter Proclamation was in its turn repealed by Proclamation No. 142 of 1910, Section 9 of which replaced the former.

Various arguments have been placed before this Court as to the proper construction to be placed upon the words "who was either at all times the sole wife of the deceased" in Section 9 (1) of the Proclamation, but in its opinion the intention and true meaning are that it does not limit the use and occupation of an allotment to a widow who had been a deceased holder's only wife during his matrimonial career. If it had been intended to deprive a widow, who had been other than a deceased holder's first and only wife by Civil Rites, of the use and occupation of his allotment and to turn her adrift, such intention should have been stated in clear and unmistakable language. The proviso in Section 9 (2) is in the opinion of the Court not applicable, for in the case of several wives married according to Native Custom, provision would necessarily have been made by the deceased husband for the maintenance of the various minor houses and the succession by the heir of the Principal House to his father's allotment would thus not entail hardship and would moreover be in accord with the principles of Native Custom.

Whatever the status of the second of two wives successively married by Civil Rites may be this Court is not prepared to accept the proposition that she is comparable to the wife of a minor house where the marriage had been contracted according to Native Custom.

Section 10 of Proclamation No. 142 of 1910 provides that an heir under the Table of Succession who is already in

possession of an allotment shall make his election within three months of the death of the registered holder or the death or remarriage of his widow as the case may be. Proclamation No. 187 of 1921 amending this Section is, so far as is relevant, in similar terms. It will be seen therefore that it is on the death or remarriage of the widow that the heir makes his election and though this section would have to be read with Section 9 there is nothing to show that it can be taken to exclude a widow in the position of the present plaintiff there never having been any other widow of the late Joel Mavayeni.

None of the authorities cited before this Court or consulted by it bear directly on the question in issue, but in the opinion of this Court the Plaintiff is a widow within the meaning of Section 9 (1) of Proclamation No. 142 of 1910 and as such is entitled, during her residence thereat, to the use and occupation of her deceased husband's allotment.

It is not necessary for the purposes of this case to determine whether the Defendant is or is not the late Joel Mavayeni's heir and entitled in terms of Section 8 (2) of Proclamation No. 142 of 1910 to succeed to his allotment, but having decided in favour of the Plaintiff concerning her claim to the use and occupation of the allotment it is necessary to determine whether she has the right to eject the Defendant in the manner and on the information disclosed in the proceedings under consideration.

It is apparent from the context that one of the objects in framing Proclamation No. 142 of 1910 was to rectify certain anomalies which had arisen in consequence of marriages between Natives by Civil Rights and to codify and give effect to certain features of Native Custom in so far as these were not inconsistent with civilized methods.

It is an established principle of Native Custom, which has long been recognized by this Court, that the head of a family is under an obligation to maintain and support the members thereof and that they are entitled to reside with him at his kraal and cannot be ejected therefrom without some good and sufficient cause. It is also the duty of an heir succeeding to his father's estate to provide reasonable maintenance for his sisters whose dowries he will receive in due course. It can hardly be contested that during the period a widow has the use and occupation of her late husband's allotment she had no greater right than he would have had to eject his son and heir or the other members of his family from their parental home. Though the pleadings allege interference and disagreement there is no evidence on record to show that the Defendant, who was living with his father at the time of the latter's death, has miscondacted himself towards the Plaintiff or interfered in any way with her use and occupation of the allotment, and before his rights and consequently those of his sisters, who are dependant upon him, can be terminated by his ejectment, it is in the opinion of this Court, necessary for the Plaintiff to prove that she had good and sufficient cause.

The appeal will accordingly be allowed with costs and the order of ejectment made by the Magistrate will be set aside. There will be no order as to costs in the Court below.

1925, July 1.

Butterworth.

WANA vs. ZOKOZOKO AND NOPAWULE.
(Willowvale Case.)

Before J. M. Young, A.C.M., President, with R. D. H.
Barry and M. G. Apthorp as Assessors.

Maintenance—Only one beast due for “isondlo”—Nothing due for providing girl’s wedding outfit and arranging for “intonjane.”

Extract from Judgment:— The case having been put to the Native Assessors they state that the Appellant has no claim to reimburse himself out of the girl’s dowry for having provided the girl’s wedding outfit and for arranging for the girl to undergo the “Intonjane” ceremony but that only one beast is claimable for maintenance. The former two cannot be demanded as of right, but allotments might be made out of the girl’s dowry by her guardian to the person who incurred the outlay purely as a matter of grace.

This view is consistent with the previous decisions of this Court.

1924, March 5.

Umtata.

DANA vs. PAMBANISO.
(Qumbu Case.)

Before W. T. Welsh, C.M., President, with P. G. Armstrong
and R. H. Wilson as Assessors.

Marriage of European to Native woman by Native Custom is invalid, but woman’s people who have received the dowry have no claim to dowries of daughters born of this invalid union.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff, now Respondent, is the heir of the late Ntame Dana and claims to be the Guardian in accordance with Native Custom of his Aunt Victoria Dana, who has, he alleges, had several illegitimate children by one Peter McGlashan, of which the Defendant, now Appellant, is one, and a girl Mimmie another. It is admitted that certain dowry has been paid by James Siwundhla for Mimmie and that this dowry, which the Plaintiff claims by virtue of his alleged guardianship of Victoria, is in the possession of the Defendant, who denies that either he or his sister Mimmie is illegitimate in as much as their mother Victoria was married to the late Peter McGlashan who paid dowry for her to the late Ntame Dana. He also pleads that if the payment made by McGlashan to the late Ntame Dana was not dowry it was a fine or fee paid for cohabiting with Victoria and that the Plaintiff has therefore no *locus standi* to sue him.

During the proceedings before the Magistrate it was admitted that Peter McGlashan was a European, that the alleged marriage between him and Victoria Dana took place

subsequent to the annexation of East Griqualand, that the stock and other articles paid by McGlashan to the late Ntame Dana were paid as dowry and that the parties lived together for 13 years.

After hearing argument on the validity of the alleged marriage the Court ruled that the marriage was illegal that the offspring are illegitimate, that the Plaintiff has *locus standi* and gave judgment in his favour for four cattle.

Against this judgment the Defendant has appealed on the grounds:—

- (1) That Native Law and Custom is against the finding of the Court.
- (2) That once a Native received dowry for his daughter whether he be European or Native, the father parts with his guardianship of his daughter.
- (3) That is was not for the Court to decide who was the heir to the children by McGlashan, but had Plaintiff the *locus standi* to sue in the case before the Court considering Victoria's father was remunerated for his daughter by accepting dowry.

It is clear that the union entered into by the late Peter McGlashan with Victoria Dana was not only after the annexation of East Griqualand, but also subsequent to the promulgation of Proclamation No. 112 of 1879. In the course of carefully considered reasons for his judgment the Magistrate states that in view of the provisions of this Proclamation it was not competent for Mr. McGlashan to contract a legal marriage with a native woman by the mere payment of dowry and in support of this opinion cites the case of Ngqobela *versus* Sihele (10 S.C.R. 346). Having decided that the so-called marriage was not legal and the children illegitimate he considered the case was governed by the decision in the case Silelo *versus* Mhlontlo (3 N.A.C. 127) and gave judgment for the Plaintiff.

In the opinion of this Court the Magistrate was correct in holding that the union of Peter McGlashan and Victoria Dana did not constitute a valid marriage, the effect, in its view, of the Proclamation, being to withhold legal sanction from a marriage contracted according to "ordinary Kaffir or Fingo forms" where one of the parties was a European. Though not definitely stated to be so it would appear from the judgment in the case of Ngqobela *versus* Sihele (*supra*) that no recognition can be accorded a marriage celebrated in these Territories without the solemnities required by statute law unless both parties were natives. As Victoria Dana was thus not the wife of Peter McGlashan it remains to be determined what rights if any the Plaintiff has to the dowry paid for their daughter Mimmie to her brother the Defendant. The late Ntame Dana whose heir the Plaintiff is, received a substantial dowry for Victoria, who thereafter lived for 13 years with McGlashan as his wife and there is nothing whatever to show that at any time till the present claim was made has the Plaintiff or Ntame regarded Victoria otherwise than as a married woman.

It seems clear that the Danas accepted the position that by the payment of cattle, admitted to have been paid as dowry,

they parted with any previously existing rights they may had in and over Victoria. The principles underlying the payment of dowry are well established, and there can be no doubt that the late Ntame Dana accepted the payment made by McGlashan with its disabilities as well as its benefits and his heir cannot be in any better position than he was.

The Plaintiff's claim is brought under Native Custom, for under no other law could it be entertained, nor could he enforce it had McGlashan been a native and thus lawfully married to Victoria.

In the opinion of this Court it would be clearly inequitable and contrary to all principles which govern such transactions to allow the Plaintiff to recover the dowry paid for Mimmie for whose mother he holds a large dowry by the receipt of which he must be held to have ceased to regard her as a member of his family whether she thereby became the wife of McGlashan or not.

The case of Silelo *versus* Mhlontlo (*supra*) relied upon by the Magistrate is distinguishable, for in that case the father of the woman had not received a dowry for her.

When Ntame Dana accepted the dowry for his ward Victoria he in the opinion of this Court parted with all previously existing rights he had in her and thereby forfeited any claim he might have had to the dowries of any daughters thereafter born to her.

There appears to be no justification for holding that the Plaintiff is entitled to succeed on the ground that though dowry was paid and accepted for Victoria her children are, owing to the form of her marriage, illegitimate.

The appeal will accordingly be allowed with costs and the judgment in the Court below altered to one for the Defendant with costs.

1925, April 7.

Lusikisiki.

GXOTIWE *vs.* NODIDWA.

(Tabankulu Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and W. C. H. B. Garner as Assessors.

Marriage—Presumption of legality—Degree of proof in adultery cases.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff having lived with the woman Mampinge for upwards of twenty years by whom he has had seven children, the presumption is that she is his wife. Though the issue is not properly raised in the pleadings the Magistrate found that the first husband, Silelo, died prior to Plaintiff's

marriage to the woman Mampinge. The same degree of proof is not required to establish a marriage in order to institute proceedings for damages against an adulterer as it would be in an action brought by the heirs of the first husband.

It is clear that Sidelo has been dead for many years and this Court is not prepared to say the Magistrate erred in finding on the probabilities and evidence that he died prior to the Plaintiff's marriage. The appeal is dismissed with costs.

1925, November 5.

Umtata.

ZWENI *vs.* KANTI.
(St. Marks Case.)

Before J. M. Young, A.C.M., President, with R. H. Wilson and G. M. B. Whitfield as Assessors.

“ Isondlo ”—Not claimable for adult who has not grown up at kraal—One beast due for incidental expenses—Reasons for judgment—Failure of Presiding Judicial Officer to comply with rules.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case Plaintiff, now Appellant, sued the Defendant, now Respondent, for three head of cattle or their value £15 as fees for the maintenance of Defendant's mother and sister and her infant child. The Defendant denied liability and pleaded that his sister is a widow and that if maintenance fees are due in regard to her and her child they are payable by the heir of her late husband and not by him. He claimed in reconvention 8 head of cattle or their value £40 and 20 sheep or their value £20 the progeny of certain cattle and sheep “ nqoma-ed ” by Defendant's father to Plaintiff 24 years ago.

After hearing evidence at considerable length the Magistrate gave judgment for the Defendant-in-convention and, in reconvention, entered judgment for the Plaintiff-in-reconvention for six head of cattle or their value £30 and 16 sheep or their value £16. From this judgment the Plaintiff has appealed on both the claim in convention and in reconvention.

With regard to the claim in convention the question whether Plaintiff is entitled by Native Custom to “ isondlo ” in the circumstances disclosed by this case which this Court, after a consideration of all the evidence, finds to be that Plaintiff invited the Defendant's mother and sister to attend a sacrificial ceremony at his kraal, that whilst attending this ceremony Defendant's mother fell ill, that she and her daughter remained on at Plaintiff's for a period of three years and that Defendant failed to take them away although requested by Plaintiff to do so, is put to the Native Assessors who state:—

“ No ‘ isondlo ’ is due for an adult who has not grown up at the kraal of the party claiming it.

“ In cases such as this all the Plaintiff would be entitled to is one beast to reimburse him for any expense he may have been put to whilst the women were residing with him.”

In view of this statement the appeal on the claim in convention is allowed with costs and the Magistrate's judgment altered to Judgment for Plaintiff in convention on the claim in convention for one beast or its value £5 and costs.

(The decision in regard to the appeal on the judgment in reconvention is of no interest and has been omitted).

The Court wishes to draw the attention of the Magistrate to the fact that in giving his reasons for judgment he has failed to comply with Order No. XXIX, Rule 3 (1) of Proclamation No. 145 of 1923.

(Note:—The Plaintiff's and Defendant's cases were wholly conflicting and the Magistrate in accepting one of the versions gave no reasons for disbelieving the other or why he considered the one accepted was worthy of credence.)

1927, November 16.

Butterworth.

MAMBI *vs.* MTSHISA.

(Idutywa Case.)

Before J. M. Young, A.C.M., President, with F. H. Brownlee and W. F. C. Trollip as Assessors.

Marriage by Christian rites—Maintenance—Action for maintenance not joined to one for divorce or separation—Marital power of husband—Section 5 (1) Proclamation No. 142 of 1910.

JUDGMENT.

By President: In this case the Plaintiff, now Respondent claimed from the Defendant:—

- (a) maintenance at the rate of £1 a month or alternative relief.
- (b) the delivery of certain movable property or its value the sum of £19. 12s.
- (c) Costs of suit.

In her particulars of claim she alleged:—

- (1) the Plaintiff was married to the Defendant in 1916, out of community of property, and the marriage still exists.
- (2) the Defendant has taken unto himself a concubine, placed her in Plaintiff's hut, and driven Plaintiff away from his kraal.
- (3) the Plaintiff has certain movable property of her own which is detailed in the list hereunto attached, and is of the value of £19. 12s.
- (4) the Defendant has possessed himself of this property, and refuses to deliver it to the Plaintiff although called upon to do so.

- (5) the Defendant through the torts afore-mentioned has made it impossible for his wife to reside at his kraal and is therefore liable for her maintenance.

Defendant excepted to the summons on the following grounds:—

- (1) that Plaintiff has no *locus standi in judicio* on the ground that it is not competent for a woman to institute action against her husband for maintenance unless such action is coupled with one for divorce or separation.
- (2) That though the parties were married since the promulgation of Proclamation 142 of 1910 and without the declaration provided for in Section 5 (1) of the said proclamation, the marital power which confers on the husband the right to manage and administer the property of the wife was never excluded by the parties, that it is therefore not competent for the Plaintiff to institute these proceedings against her husband who is her guardian and the proper person to be in charge of any property she may possess.

The Magistrate overruled both exceptions with costs holding that it was competent for an action of this nature to be brought by a wife without coupling it with a claim for divorce or separation and that the marital power was excluded by Section 5 (1) of Proclamation No. 142 of 1910.

Against this ruling an appeal has been brought with the consent of the parties as provided by Section 73 sub-section 2 (c) of Proclamation No. 145 of 1923.

In the case of *van der Merve versus van der Merve* (E.D.C. 1926, 248), in which the wife applied to the Court for funds to institute proceedings for maintenance, Mr. Justice Pittman stated *inter alia* “ I have very grave doubt whether an action of the kind contemplated by the applicant is competent to her, that is to say, an action against her husband for maintenance which is not joined to any claim for separation or divorce. Mr. Back who appears for the Applicant has confessed that he has been unable to find any authority in support of the proposition that such an action is available to the wife; and so far as my own researches have gone I also have been unable to trace any such authority. Reference to Fraser’s book on husband and wife in the law of Scotland seems to indicate that according to that law at any rate such an action is not competent to the wife.

In view of this dictum this Court is of opinion that the Magistrate erred in overruling the first exception.

With regard to the second exception the Magistrate was clearly wrong in holding that the marital power was excluded by Section 5 (1) of Proclamation No. 142 of 1910. The intention of that section was to exclude the operation of Colonial law in regard to the administration of and succession to the property of Natives married by Christian or Civil rites and to place the parties on the same footing in this respect as they would have been had the marriage been entered into by Native Custom. There is no exclusion of the marital power

either expressed or implied in the section above referred to. In the case of William Figlan *versus* Alicia Figlan * heard in this Court at Umtata in March, 1924, it was ruled that the meaning and intention of Section 5 (1) of Proclamation No. 142 of 1910 was to provide an automatic means by which community of property would ordinarily be excluded, but that does not in any way limit a husband's marital power which is a matter to be regulated by other means.

The appeal is allowed with costs and the Magistrate's ruling altered to Exceptions allowed and summons dismissed with costs.

1927, November 10.

Umtata.

TWAYI *vs.* SIRAYI.
(Tsolo Case.)

Before W. T. Welsh, C.M., President, with G. M. B. Whitfield and R. C. E. Klette as Assessors.

Native Law and Custom—Isondlo—Not claimable in respect of a man who had lived as a son at a kraal from infancy to manhood and for whom dowry had thereafter been provided—Claim for re-imbursement of dowry not competent until dowry has been received for daughter of the wife whose dowry has been so provided.

In this case Sirayi claimed from Twayi 3 head of cattle or their value £15 and costs, being one beast as "Isondlo" and two head of cattle as a refund of the dowry paid for Defendant. Plaintiff is the eldest son and heir of the late Gibisela who brought up and maintained the Defendant from his infancy to manhood, procured a wife for him and paid two head of cattle as dowry for her. The Magistrate entered judgment for the Plaintiff on both claims, holding in regard to the first claim that Defendant was under an obligation to pay the maintenance beast notwithstanding the custom and on the second claim that the two head of dowry cattle were loaned to Defendant by Gibisela on the express agreement that he would work and earn sufficient money to repay the loan. Defendant appealed on the following grounds:—

- (1) that it is not in accordance with Native Custom to demand "Isondlo" for a Native male who has grown up to manhood at a kraal, in which event he is looked upon as the son of that kraal.
- (2) that even if such is the custom the claim for the same must have been waived by the father of Plaintiff (Gibisela) who made no claim for the same for over 20 years.
- (3) that the claim for two head of cattle alleged to have been given to Defendant to pay dowry is contrary to Native Custom, where such cattle are always refunded from the dowry of the eldest daughter of the marriage.

* Page 70 of these Reports.

- (4) That in view of the circumstances surrounding this case and the length of time which elapsed before Plaintiff commenced his action the evidence produced was not sufficient to support the Magistrate in his judgment.

JUDGMENT.

By President: The Native Assessors having been consulted state:—

- (a) that “ Isondlo ” cannot be claimed in respect of a man who had lived as a son at the kraal in question from infancy to manhood and for whom dowry had thereafter been provided.
- (b) that no claim for reimbursement of the dowry paid can be made until dowry has been received for the daughter of the wife whose dowry had been so provided.

In view of this statement of Native Custom the appeal will be allowed with costs and the judgment in the Court below altered to one for the Defendant in respect of the claim for “ Isondlo ” and to absolution from the instance in regard to the claim for dowry. The Defendant to have his costs in the Court below.

1927, March 2.

Umtata.

NGESE *vs.* SAMENTE.
(Mqanduli Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and E. G. Lonsdale as Assessors.

Maintenance (Isondlo)—Child born at dowry holder's kraal and resident there—Claim against child's father by dowry holder for maintenance.

JUDGMENT.

By President: In this case, the Plaintiff, now Respondent, obtained judgment against the Defendant, now Appellant, for one beast or its value, £5 as maintenance for his married sister's child. This woman mother of the child, had left her husband's kraal and returned to the dowry holder where the child in question was born and resided for some four years when it was removed.

The Native Assessors having been consulted state that the Plaintiff although he is the dowry holder, is entitled to one beast for the maintenance of his sister's child, it having been born at his kraal, where he maintained it for a period of four years.

This Court is accordingly not prepared to interfere with the Magistrate's award nor with his dismissal of the claim in respect of the child Madala.

The appeal is accordingly dismissed with costs.

1926, March 8.

Umtata.

STIMELA AND KOMFULANA *vs.* MADOLO.

(Umtata Case.)

Before W. T. Welsh, C.M., President with H. E. F. White
and R. C. E. Klette as Assessors.

Marriage—Action by guardian of girl for dowry paid constitutes acquiescence—Guardian estopped from suing for return of girl and damages.

The facts are fully set out in the following judgment.

JUDGMENT.

By President: The facts in this case appear to be that a minor Soliwe was given in marriage by one Morrison to Colbert Madolo who paid Morrison six cattle of dowry. Soliwe had been brought up by Morrison to whom she had been given when a very young child by her father the late Maqokolo. In June, 1925, the Plaintiff in this case, Stimela Maqokolo, heir to the late Maqokolo, obtained judgment against Morrison declaring him to be the guardian of the girl Soliwe and entitled to all cattle paid or to be paid either as fine or dowry for her, and also for the six head of cattle already paid as dowry. Thereafter Stimela instituted the present proceedings against the Defendant in which he claimed delivery of the said Soliwe and payment of £50 as damages for abduction and cohabitation.

The Defendant pleaded that the marriage took place after the payment of six cattle as dowry to Morrison, and that the Plaintiff having obtained judgment against Morrison for the said dowry had acquiesced in the marriage.

The Magistrate gave judgment for the Defendant, and the Plaintiff has appealed.

The payment of a dowry of six cattle, the consent of the girl Soliwe and of Morrison, and the subsequent action of the Plaintiff, Soliwe's guardian, in obtaining an order against Morrison for the dowry constitutes, in this Court's opinion, a valid marriage according to Native Custom. That being so, the Plaintiff can have no action against the Defendant for the delivery of Soliwe to him or for the damage claimed.

The appeal is dismissed with costs.

1926, August 13.

Lusikisiki.

GEMPEZA *vs.* NTSIZI.

(Tabankulu Case.)

Before J. M. Young, Ag. C.M., President, with O.M. Blake-way and E. W. Bowen as Assessors.

Marriage—Boy under age of puberty—“ Ngena ” of woman by man appointed by boy’s father.

The facts are sufficiently stated in the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff, now Respondent, sued the Defendant, now Appellant, for three head of cattle or their value £15 as damages for adultery alleged to have been committed with his wife.

The facts found by the Magistrate are that about the year 1916, whilst Respondent was a boy under the age of puberty, his father, Wela, arranged a marriage by Native Custom between him and Matibe, daughter of Siswana, that owing to Respondent’s youth, it was arranged that Appellant an “ ngena ” son of Wela, should “ ngena ” Matibe at Wela’s kraal, and act as a husband to her until Respondent attained an age when he could himself perform the duties and obligations of a husband, that about two years ago, while Matibe was under “ teleka,” Wela called the relatives together and formally cancelled the arrangements entered into with Appellant, that upon her release from “ teleka,” and notwithstanding such cancellation of the “ ngena ” agreement, Appellant continued to cohabit with Matibe at his own kraal, and treat her as his wife.

In her evidence Matibe says that she regards Appellant as her husband, and at no time consented to be the wife of Respondent and never looked upon him as such.

At the request of the parties, the question whether such a marriage custom, as alleged by Respondent, is observed by the Pondo people, is put to the Native Assessors, who state:—

“ There is no such custom. A boy under the age of puberty cannot marry, and it was not competent for his father to marry a wife for him in the manner alleged.”

This Court concurs in this expression of opinion. Even if such a custom is in vogue, it cannot be supported.

The appeal is allowed with costs, and the Magistrate’s judgment altered to judgment for Defendant with costs.

1925, November 4.

Umtata.

NOHAKISI *vs.* SIBEDLELA.

(Mqanduli Case.)

Before J. M. Young, A.C.M., President, with E. G. Lonsdale
and G. B. M. Whitfield as Assessors.

*Allotment to Right Hand House—What constitutes Nqomá
by Great House to Right Hand House.*

JUDGMENT.

By President: The Respondent, Plaintiff in the Magistrate's Court, sued the Appellant for fourteen head of cattle or their value £112 and alleged that he was the eldest son and heir of the Right Hand House of the late Mbulungwana and that the animals claimed are the progeny of a heifer transferred by the late Mbulungwana to the Right Hand House to reimburse that house for certain small stock which had been utilized for the purposes of the Great House.

It is common cause that there are fourteen head of cattle progeny of the heifer in question and that Plaintiff is the heir of the Right Hand House. Defendant, who is the widow of the Great House, denies that any stock belonging to the Right Hand House was used by the Great House and that the heifer was apportioned to the Right Hand House. Mamse, a son of the Qadi of the Great House and heir of the Great House, admits that the milk of the heifer and her progeny has always been used by the Right Hand House and says that this was done on the instructions of his father the late Mbulungwana. He denies, however, that any apportionment took place. His mother, widow of the Qadi of the Great House, supports the Plaintiff in his statement that the heifer was assigned to the Right Hand House.

Plaintiff's mother admits that at the time the animal was set apart for the use of the Right Hand House it was not earmarked and that the members of the family were not called to witness the transfer.

The Native Assessors having been consulted state:—

The action of the late Mbulungwana in directing that the milk of the heifer and her progeny should be used by the Right Hand House did not amount to an allotment under Native Custom of the heifer to the Right Hand House. In order to constitute such an allotment he was bound to consult the family ('amalowa') and earmark the animal. The transaction amounted to a 'nqoma' of the heifer to the Right Hand House and this house may ask for one or more of the progeny."

In view of this statement of the custom this Court is of opinion that the Plaintiff has failed to prove satisfactorily the alleged transaction in which the formalities required by Native Custom have not been observed.

The appeal is allowed with costs and the Magistrate's judgment altered to absolution from the instance with costs.

1925, December 1.

Lusikisiki.

JIJWA vs. MBUSWANA.

(Tabankulu Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway
and E. W. Bowen as Assessors.

“*Nqoma*”—*Admission of certain increase by holder—*
Onus probandi on him to account therefor.

Plaintiff alleged in his summons that many years ago he gave Defendant two cows under the custom of “*nqoma*” which had increased to 22, for the delivery of which he sued.

The Magistrate absolved the Defendant and Plaintiff appealed.

JUDGMENT.

By President: In his plea the Defendant admits that the cattle increased to 15 and the onus is therefore upon him to account for these. The Magistrate does not accept his explanation for he says his (Defendant's) evidence may or may not be true.

It is therefore not necessary to discuss the evidence adduced on behalf of the Plaintiff in so far as the 15 cattle referred to in the plea are concerned. Of these 15 the Plaintiff has admittedly received 9, viz.:—Two fetched by himself, 6 handed over to his messengers by the Defendant, and 1 reported to have died, the death of which the Plaintiff accepted. The onus in regard to the remaining 6 has not been discharged and the Plaintiff is accordingly entitled to a judgment in respect of them.

The appeal will be allowed with costs and judgment in the Court below altered to one for the Plaintiff for 6 cattle or their value at £5 each. There will be absolution from the instance in regard to the balance of the claim.

1923, April 5.

Kokstad.

SCHOEMAN vs. DLODLO.

(Mount Frere Case.)

Before J. M. Young, A.C.M., President, with F. E. H.
Guthrie and F. H. Brownlee as Assessors.

Practice—Counterclaim—Privity of contract—In action brought by wife assisted by her husband, Defendant cannot counterclaim against the husband.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Appellant, Amelia Schoeman, assisted as far as need be by her husband, Jacobus Petrus Schoeman, sued the Respondent for the sum of £12. 13s. 6d. for goods sold and delivered. Respondent admitted liability in the sum of £11. 0s. 6d. and counterclaimed for the sum of £54 made up as follows:—One wagon sail £18, wagon hire £21 and damages £15.

The Magistrate gave judgment for Plaintiff in convention for the sum of £11. 0s. 6d. and costs for Plaintiff in reconvention for the sum of £32. 1s. and costs. Against the judgment on the claim in reconvention an appeal has been brought on the grounds *inter alia* that a judgment on the counterclaim could not be entered against the present Appellant.

The evidence discloses that whatever claim the Respondent might have is against Jacobus Petrus Schoeman, who is not a party to the suit, and not against the present Appellant.

The appeal is allowed with costs and the Magistrate's judgment altered to "Judgment for Defendant in reconvention with costs."

(*Note:* It is agreed by the representatives of the parties that Amelia Schoemau is a native.)

1923, July 20.

Butterworth.

MAGUGWANA *vs.* NYANGIWE.

(Tsomo Case.)

Before W. T. Welsh, C.M., President, with R. D. H. Barry and G. D. S. Campbell as Assessors.

Joinder—Identity of interest.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Defendant, Nyangiwe Mali, was summoned to answer the Plaintiff, Magugwana Mali, who alleged that he sued in his capacity as the eldest son and heir of the late Mali Nkehla and in his capacity as the guardian in Native Law and Custom of one Mpiti Mhlaba, the heir in the right hand house of the late Mali Nkehla, he

the said Magugwana Mali being therein referred to as the Plaintiff in an action for certain wool or damages in lieu of such value.

No evidence was led but it appears from the summons that the cause of action is the wool of a certain flock of sheep which are alleged to belong to the Plaintiff and to the said minor—heirs to the Great and Right Hand Houses respectively of the late Mali Nkehla—which sheep were shorn as one flock and sold as one lot by the Defendant.

To this summons the Defendant excepted that the Plaintiff had no right to maintain two separate actions, of two different Plaintiffs, against the Defendant, in one action.

The Magistrate allowed the exception and dismissed the summons with costs, holding that the Plaintiff was suing in two distinct capacities, and therefore as two distinct persons, and that the subject property of the dispute is divisible and separate.

Against this ruling the Plaintiff appeals on the grounds—

- (1) that the exception taken was one based entirely under Roman Dutch Law;
- (2) that it is not competent to take an exception so based in a case in which the question to be decided depends wholly on Native Law and Custom;
- (3) that the exception was bad in law and wrongly taken and should not have been allowed on the grounds that in Sections 2 and 3 of Summons there are direct allegations of joint interest in the Plaintiffs in the subject matter of the action, and it therefore became necessary on the part of the Defendant to rebut such allegations by evidence.
- (4) that the joinder of the interested parties, as done in the present matter, brought all of them before the Court.

In the case of *Lipuku versus Mackai* (Bisset and Smith, Vol. 5, p. 670), it was held that an exception of misjoinder, in that the Plaintiff sued both in his capacity as father and natural guardian of his minor daughter, and in his individual capacity for damages for seduction, for lying in expenses and for maintenance, was bad and should be overruled.

In the present case a common ground of action and identity of interest are alleged by the Plaintiff, who is the proper person to institute an action on behalf of his ward.

Following the case of *Lipuku versus Mackai* (*Supra*) and the case of *Majomboyi* and another *versus* Nobeqwa (2 N.A.C. p. 63) this Court is of opinion that the Magistrate erred in allowing the exception.

The appeal is accordingly allowed with costs and the Magistrate's judgment altered to Exception overruled with costs.

1923, December 11.

Kokstad.

MANTI *vs.* SUNDU.

(Umzimkulu Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright
and P. S. Laney as Assessors.

*Magistrate's Jurisdiction—Act 20 of 1856—Courts in East
Griqualand may issue a decree of perpetual silence.
(Note: Vide Section 37, Proclamation 145 of 1923.)*

The facts are immaterial.

JUDGMENT.

By President: In this case the Plaintiff, now Appellant, sued in the Magistrate's Court for an order imposing a decree of perpetual silence upon the Defendant, now Respondent. To the Plaintiff's summons Defendant excepted "on the ground that the above Court has no jurisdiction to try the case as title to land is in question and cannot for want of jurisdiction, decree perpetual silence against Defendant, and that it is essentially a matter that can only be properly brought before and adjudicated on by a Superior Court."

The Magistrate upheld the exception and dismissed the summons with costs. Against this ruling the Plaintiff has appealed. In his reasons for judgment the Magistrate says it is laid down in sub-section 3 of section 8 of Act 20 of 1856 that a Magistrate has no jurisdiction in or cognizance of any action or suit wherein the title to any lands or tenements is in question.

Whether or not title to land is in dispute in this case section 8 of Act No. 20 of 1856 is not in force in these Territories.

It was ruled in the case of *Moffat versus Touyz & Co.* (1918, E.D.L. 316) that Magistrates in East Griqualand have in civil cases an unlimited jurisdiction save in respect of causes for divorce and separation, and that the provision in section 23 of Proclamation No. 112 of 1879 that the procedure for Magistrates' Courts shall "as near as may be and as far as circumstances permit be the same as those in Courts of Resident Magistrates in the Cape Colony" does not limit the wide jurisdiction conferred in the earlier portion of this section. This Court is therefore of opinion that the Magistrate's Court has jurisdiction to make the order asked for. The Appeal will be allowed with costs, and the Magistrate's ruling altered to exception overruled with costs.

1926, July 13.

Umtata.

NDEVUZENJA *vs.* MYENDEKI.

(Mqanduli Case.)

Before J. M. Young, Ag. C.M., President, with W. J. Davidson and G. M. B. Whitfield as Assessors.

Application to intervene as co-defendant—Magistrate's power to grant—Res judicata.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case, Plaintiff, now Appellant, sued Defendant, now Respondent, for a declaration of rights and the delivery to him of four head of cattle in respect to a girl Qakata.

Respondent objected to the summons on the ground that the matter was *res judicata* and in support of his objection referred to the case of Myendeki Tsimbi *versus* Nogqala Sibaka and Ndevuzenja, in which judgment *by consent* was given in the Magistrate's Court on the 24th October, 1918.

The objection was upheld, and the appeal is against that ruling.

In the case above referred to, application was made on behalf of Appellant to intervene as Co-Defendant.

The questions which this Court has to decide are:—

- (1) Had the Magistrate power to grant the Appellant's application to intervene as Co-Defendant?
- (2) Was the application granted? and
- (3) If so, does the judgment in that case debar him from bringing the present action?

With regard to the first question, the Court has considered the authorities available and is of opinion that the Magistrate had such power. Particular attention is invited to Nathan, Vol. IV, page 2,114, paragraph 2,128 and *Ex parte* Marais and Co. (C.P.D. 1915, page 272).

Coming to the second question, although there is no actual note on the record to that effect, it is clear that the application was granted. The Appellant's name was inserted on the record, a joint plea was filed and Appellant appeared in person.

Finally, the third question should be answered in the affirmative. The Appellant by intervening submitted himself to the jurisdiction of the Court and the judgment against him as Co-Defendant must therefore stand.

The appeal is dismissed with costs.

1925, March 4.

Butterworth.

QONDANI *vs.* CETYWAYO.
(Willowvale Case.)

Before J. M. Young, A.C.M., President, with O. M. Blake-way and R. D. H. Barry as Assessors.

Malicious Prosecution—"Setting the law in motion."

Plaintiff sued Defendant for malicious prosecution. Defendant contended, *inter alia*, that the warrant for Plaintiff's arrest was issued on affidavits of two women and some days before a statement was taken from him (Defendant) and that therefore he had not set the law in motion. He admitted that he had taken the women in question to the Police to make statements. The Magistrate gave judgment against him and in appealing he gave as one of his grounds the above contention.

EXTRACT FROM JUDGMENT.

By President: The Defendant admits having set the law in motion and although the Prosecutor did not take his statement until the Monday and alleges he was prepared to act without his evidence, the fact is admitted by the Defendant that he was the real complainant on the previous Saturday.

The appeal is dismissed with costs.

1925, April 6.

Lusikisiki.

KOTSA *vs.* MAKOSONKE.
(Port St. John's Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and W. C. H. B. Garner as Assessors.

Practice—Costs—Construction of wording of summons—Not necessary to give particulars of costs in defended actions.

The facts are immaterial.

JUDGMENT.

By President: In this case the main argument of the Appellant has been directed against that portion of the Magistrate's judgment depriving the successful Plaintiff of his costs. In his reasons for judgment the Magistrate bases his decision to refuse costs on the ground that the summons does not claim them and that the Plaintiff did not ask for them in his evidence.

The summons follows the form (No. 4) prescribed by the Rules, but the Magistrate held that the words "and costs" preceding the words "particulars whereof are endorsed hereon" apply only to defended actions. This Court is unable to accept this construction.

Order XXXI, Section 1 (1) provides that the Court in giving judgment may award costs as may be just, and Section 38 of Proclamation No. 145 of 1923 enacts that the Court may, as the result of the trial of an action, grant such judgment as to costs as may be just.





In the case of *Sing versus Sing* (1911, T.P.D. 1034) as reported on page 94 (Second Edition) of Buckle and Jones on the Civil Practice of the Magistrates' Courts it was ruled that the failure to include a prayer for costs in the claim does not debar the Court from awarding the successful party his costs where the opposite party has appeared and contested the matter even though an amendment is not formally asked for.

In the case of *Brickman's Trustee versus The Transvaal Warehouse Company, Ltd.* (1904, T.S. 584) it was held that the fundamental principle awarding the successful party his costs should not be departed from except there be good grounds for so doing, such as misconduct or other exceptional circumstances.

In the opinion of this Court the Magistrate has erred in depriving the Plaintiff of his costs. The appeal is accordingly allowed with costs and the judgment in the Court below amended to read "Judgment for the Plaintiff for £7 with costs."

1925, August 7.

Kokstad.

MASHIYA *vs.* KANA.

(Mount Fletcher Case.)

Before J. M. Young, A.C.M., President, with F. H. Brownlee and H. E. Grant as Assessors.

Attachment in execution—Creditor accepts attached stock in settlement of claim—No advertisement and no sale by auction—No good title conveyed as under Section 51. Proclamation No. 145 of 1923.

The relevant facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Appellant, Mashiya Sepuhle, obtained a judgment in the Magistrate's Court at Mount Fletcher on the 1st October, 1924, against Qepeza Lebata and Teko Lebata for seven head of cattle or £50. A warrant of execution against the property of the Defendants was issued on the same day and 2 oxen, 1 cow and calf and 23 goats were attached. Contrary to the usual practice the cattle and goats were handed by the Messenger to the judgment creditor in part settlement of the judgment.

The procedure laid down by sub-section 9 of Section 5 of Order XXIV of Proclamation No. 145 of 1923 not having been complied with, the Appellant, in the opinion of this Court, cannot claim the protection of Section 51 of the Proclamation.

The Respondent is not bound to proceed by way of interpleader but has a right of action at common law against any person in whose possession his property is found.

On the question of fact there is ample evidence to show that when the stock was attached representations were made to the Deputy Messenger that it was the property of the Respondent. The evidence led supports the statement made at the time of the attachment.

The appeal is dismissed with costs.

1927, March 3.

Umtata.

SIKADE vs. FANEKISO.

(Umtata Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and E. G. Lonsdale as Assessors.

Execution—Estoppel—Finality of judgment.

A judgment debtor who was sued in respect of estate property including cattle, but who, throughout the proceedings, neglected to prove that certain estate cattle were no longer in existence and did not differentiate between stock which he claimed to hold as heir and that which he acquired by other means, held estopped after execution had been made indiscriminately against all the property in his possession, from instituting an action the purpose of which was to obtain a modification of the judgment of the Court by evidence which was available at the time of the original action.

JUDGMENT.

By President: In the opinion of this Court the property claimed in the summons issued by Fanekiso Klaas against Sikade Klaas was in respect of estate property. After the issue of a writ to enforce that judgment the present Plaintiff instituted an action wherein he claims certain stock as his personal property which he alleges was unlawfully attached. The Defendant, however, contends that that judgment was against the Plaintiff personally and that he is entitled to satisfy it by levy against the Plaintiff's own property. During the whole of the proceedings in that case no attempt was made by the Defendant, the present Plaintiff and Appellant, to show that any of the property claimed was no longer in existence.

Notwithstanding his neglect to place his position, which it is now alleged had altered for the worse, before the Court, the present Plaintiff asks for an order that execution should issue only against such estate stock as was in existence at the time of the judgment, he also claims damages for illegal attachment.

No authority in support of the claim having been cited this Court is of opinion that the Plaintiff having failed to take any steps to place his position before the Court at the proper time is now precluded from doing so. The effect of granting the application would be to modify that judgment materially by the admission of evidence then available. Moreover such procedure would create uncertainty in practice and interfere with the finality of judicial decisions.

The appeal is dismissed with costs.

Note: The original case before the Appeal Court will be found on page 178.

1926, May 17.

Kokstad.

GQEZU *vs.* GXAZA.
(Umzimkulu Case.)

Before J. M. Young, Ag. C.M., President, with W. G. Wright and F. N. Doran as Assessors.

Civil Imprisonment—Privilege—Execution of warrant when debtor attending Court for purposes of trial—Rule 5 of Order XXVI of Proclamation No. 145 of 1923.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In the opinion of this Court the Magistrate has erred in refusing the application for release from arrest.

It is true that Rule 5 of Order XXVI of Proclamation No. 145 of 1923 permits of the execution of a warrant of civil imprisonment at any place except within the residence of the person to be arrested, but it was never the intention to take away any of the privileges the debtor has under the Common Law.

In this case the Appellant was arrested whilst attending Court for the purpose of a trial. He had been apprehended on a criminal charge, had been convicted and released on bail and should have been allowed a reasonable time to reach his home after the trial was over. This was not done.

In this Court's opinion the occasion of the arrest was a privileged one and the appeal must be allowed with costs and the Magistrate's judgment altered to application for release from arrest granted with costs.

1923, March 20.

Umtata.

TYALITI *vs.* MCOYANA.
(Xalanga Case.)

Before J. M. Young, A.C.M., President, with R. H. Wilson and J. W. Mitchell as Assessors.

Practice—Summons—Defect in—Copy not true copy of original.

The facts are immaterial.

JUDGMENT.

By President:—The Respondent sued the Appellant in an action for damages for slander. On the return day the exception was taken that the copy of the summons served on the Appellant was insufficient and bad in law, inasmuch as it does not state the place of holding of the said Court." This exception was overruled.

In the case of *Matoti versus Kuse*, heard in this Court in March, 1919 (4, N.A.C. 295) it was held "that the copy of a summons served on Defendant must be a true copy of the original and when the copy left with the Defendant is not a true copy the service is held to be insufficient."

In view of this ruling this Court is of opinion that the Magistrate was wrong in overruling the exception.

The appeal is allowed with costs and the Magistrate's ruling on the exception altered to Exception allowed and Summons dismissed with costs.

1923, July 11.

Umtata.

DANISO *vs.* RANSI.

(Engcobo Case.)

Before J. M. Young, A.C.M., President, with O. M. Blakeway and P. G. Armstrong as Assessors.

Practice—Incomplete record—Where an important documentary exhibit was mislaid after production in Court, the record was remitted for its production or secondary evidence to be taken of its contents.

The facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The record in this case is incomplete. An exhibit which might have an important bearing on the matter in dispute is missing. Without this document, or, if it is lost, some secondary evidence of its contents, this Court is not at present disposed to deal with the appeal. The record is returned to the Magistrate, who is instructed to cause diligent search for the missing pass to be made. If it cannot be found, evidence to that effect should be taken and secondary evidence of its contents produced. The question of costs to stand over until the hearing of the appeal.

1924, November 24.

Umtata.

PAMBILI *vs.* DLANGAMANDLA.

(Engcobo Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and H. E. F. White as Assessors.

Procedure—Verbal ex parte application—No record before Appeal Court.

In his notice of appeal the Appellant appealed, *inter alia*, against an order made by the presiding Judicial Officer on a verbal *ex parte* application made by him (Appellant) subsequent to judgment. There was no record in the proceedings of either the application or the decision, although stray reference was made to the matter in the Magistrates' reasons for judgment. Respondent objected to the hearing of this portion of the appeal.

DECISION ON OBJECTION.

By President: In the opinion of this Court the objection to the hearing of the appeal directed against the *ex parte* application is well founded, there being no record before it of those proceedings.

The objection is therefore sustained with costs.

1925, December 4.

Kokstad.

MOTAUNG vs. PINDANI.

(Mount Fletcher Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright
and R. D. H. Barry as Assessors.

*Appeal record alleged to be defective—No steps taken to have
record amended—Record assumed to be correct.*

On appeal, Appellant's attorney contended that the record of proceedings was defective in that sufficient notes of the proceedings had not been made, but adduced no evidence in support thereof. No steps had been taken to have the record amended in terms of Rule 3 (1), Order XIX, Proclamation No. 145 of 1923.

The fourth ground of appeal was that the Magistrate should not have allowed an amendment to Defendant's plea after the Plaintiff had closed his case.

JUDGMENT.

By President: In regard to the fourth ground of appeal the amendment was, in this Court's opinion, competent in terms of Section 99 (1) of Proclamation No. 145 of 1923.

It has been stated before this Court on his behalf that the Appellant was not aware that the plea had been amended by the Magistrate. Rule 3 (1) of Order XIX makes provision for the amendment of errors, but as the notice of appeal is not dated this Court is unable to say whether the Appellant had or had not discovered the alleged omission from the record within the prescribed time. In the absence of information to the contrary the record must be assumed to be complete. In any case this Court is not prepared to say the amendment prejudiced the Appellant.

In regard to the merits of the appeal this Court is of opinion that the Magistrate's finding should not be disturbed. The appeal is dismissed with costs.

1924, December 12. 1925, January 21.

Lusikisiki.

LANGA vs. KONKOTA.

(Flagstaff Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson
and W. C. H. B. Garner as Assessors.

*Procedure—Withdrawal of plea containing admissions—
Substitution of Special plea under Rule XIV (4) based
on allegations in summons. New defence not arising
during trial.*

The facts are sufficiently clear from the judgment of the Native Appeal Court⁴

JUDGMENT.

By President: The Plaintiff, now Appellant, sued the Defendant, now Respondent, for certain cattle and sheep, stating (1) that he is the heir of his late father, John Langa, and also the heir of his grandfather, the late Noqutywa. The summons alleges (2) that in the year before rinderpest the Defendant married one Nella, daughter of the said Noqutywa, who lent her a filly, whose increase was to be exchanged for cattle to be milked for the said Nella; (3) that the said filly remained at the Defendant's kraal and had three foals, two of which were exchanged for certain cattle and sheep, while the original animal and its remaining foal were removed by Noqutywa, who left a heifer and eight sheep with the Defendant. (4) The Plaintiff claims delivery of the progeny of the said heifer, amounting in all to 15 cattle now in Defendant's possession and an account of the sheep and their increase.

To this claim, which was issued on 18th September, 1924, the Defendant, on the 29th idem, pleaded that:—

- (a) Save and except that he admits that he married Nella, the daughter of the late Noqutywa, about the time alleged, Defendant denies paragraph 2 of the summons, and states that the late Noqutywa "ngomaed" a mare to the Defendant and instructed the Defendant to exchange the increase of the mare for cattle for him.
- (b) In regard to paragraph 3 Defendant states that the said mare had increase of four foals, one of which was exchanged for a heifer, another for 5 sheep and 3 goats and a third foal for a bull calf. He admits that the two horses and the bull calf were taken away by the late Noqutywa, who also took the 5 sheep away, the goats having all died without leaving any increase. Defendant denies that he has any sheep belonging either to the estate of the late Noqutywa or to the Plaintiff.
- (c) With regard to paragraph 4 of the summons, Defendant pleads that when he took away the other animals above described, the late Noqutywa apporportioned the Defendant the heifer as a reward for "ngoma." He admits that this heifer has now increased to 12 head of cattle, which the Defendant claims as his property, and denies liability to the Plaintiff.

On 11th November the matter came before the Court for trial, when verbal application was made on behalf of the Defendant to plead specially to the summons in the following terms: That inasmuch as the "ngoma" of the filly in question is alleged to have been made to Nella, the wife of the Defendant, the Defendant is not the proper party to be sued and that the action should have been directed against Nella.

The Defendant's attorney withdrew the first plea for the purpose of the new defence thus set up. The Plaintiff's attorney contended that the special plea amounted to an objection which should have been taken within seven days after appearance under Order XII and that it was then too late to raise the said objection. The Magistrate ruled that the special plea amounted to a new defence and that there was in the pleadings *prima facie* evidence of the defence on some other ground than that already pleaded. He allowed the special plea, holding that Rule 4 of Order XIV applied, and ruled that according to the summons the filly was actually "ngomaed" to Nella, who should have been sued, and dismissed the summons. An appeal was noted on the following grounds:—

- (1) The special defence or objection should have been taken within seven days of appearance being entered (see order XII) and it was not competent for Defendant to raise such objection or special defence the day before the trial. The Defendant pleaded to the summons, the pleadings were closed, and the issues were joined and the case should have gone to trial on the pleadings.
- (2) Plaintiff alleges that Defendant is in possession of the cattle claimed and neglects and refuses to hand them over and this Defendant admitted in his plea so that he is obviously the right person to be sued.
- (3) No evidence was lead and without evidence it is impossible for the Court to properly decide any of the issues.

The Magistrate in his reasons for judgment said: "In this case the Court ruled that the special plea applied for amounted to a new defence and that in the pleadings there was *prima facie* evidence of the defence on some other ground than that already pleaded. The special plea was therefore allowed under Section 4 of Rule No. 14, and being so allowed I ruled that Nella, to whom, according to the summons, the filly in question was actually "ngomaed," should have been sued and not the Defendant, and I accordingly dismissed the summons with costs."

In the opinion of this Court the defence taken and put forward on the 11th November is neither an exception nor an objection within the meaning of Order XII of the Magistrate's Courts Proclamation No. 145 of 1923. It was stated to be a special plea and was upheld by the Magistrate as such by virtue of the provisions of Rule 4 of Order XIV, but in the opinion of this Court that Rule does not apply as it cannot be said that evidence of a defence on some other ground than that pleaded had emerged during the trial, which as a matter of fact had not yet commenced. The meaning of this rule would appear to be that it enables a Defendant to raise a defence of which he was not aware when he pleaded or of which he acquired knowledge from facts disclosed during the course of the trial. There appears to have been no reason why the special plea could not have been raised *ab origine*.

It is based on the allegations disclosed in the summons and nothing had transpired since the filing of the first plea which justified the Rule relied on by the Magistrate, being put into operation.

As, in the opinion of this Court, Rule 4 of Order XIV does not apply it still remains to be considered whether the Defendant was otherwise justified, as he claimed to be, in withdrawing his first plea and substituting the second. The summons alleges that the heifer and 8 sheep were left by Noqutywa with the Defendant and that the increase of the heifer, amounting to 15 head, is now in the possession of the Defendant. The first plea admits the possession by the Defendant of 12 cattle, which he states are progeny of the original heifer and which he says Noqutywa apportioned him as a reward for "nqoma." While wide powers of amendment are conferred upon the Court by the Proclamation it appears that admissions made by the Defendant may only be withdrawn when the Court is satisfied that they were made by a *bona fide* mistake and that their withdrawal will not prejudice the Plaintiff to an extent which cannot be compensated by an order as to postponement, costs or otherwise, while in the case of *Odendaal versus Te Groen* (1923, O.P.D. 7) it was doubted whether, even in such circumstances, a withdrawal is permissible. The Defendant having admitted that the heifer was apportioned to him personally and not to his wife Nella and that the cattle in his possession are progeny of the original heifer, the Plaintiff is, in this Court's opinion, entitled to object to the withdrawal of the plea containing these admissions and to claim that the case should go to trial on the issues thus raised. There is also nothing whatever to explain why the new defence was not raised *ab initio* and indeed it would be difficult to suggest any unless it be that it was an afterthought which would not be a valid ground. In the absence of any explanation, leave, even to amend a plea, was refused in the case of *Oblowitz Bros. versus Guardian Insurance Co., Ltd.* (1924, C.P.D. 64).

This Court is therefore of opinion that the Magistrate erred in allowing the Defendant to withdraw his original plea and substitute the one objected to.

The appeal is accordingly allowed with costs. The judgment in the Court below will be altered to one upholding with costs the Plaintiff's objection to the substitution of the special plea which is set aside and the case returned to proceed on the issues raised by the original plea.

1927, December 8.

Kokstad.

MALAMLELA vs. MALAMLELA.

(Matatiele Case.)

Before W. T. Welsh, C.M., President, with H. E. Grant and
W. H. P. Freemantle as Assessors.

Costs — Summons — Withdrawal — Fresh Summons —

A Defendant cannot object to a Plaintiff issuing a fresh summons in a matter in which he had issued and withdrawn a previous summons merely because Plaintiff had not paid Defendant's costs incurred in connection with the previous summons, unless the Defendant had obtained a judgment in his favour for such costs, or consent to pay such costs had been filed by Plaintiff in terms of Rule 2 (2) Order XVIII Proclamation No. 145 of 1923, which consent has the force of an order of court.

JUDGMENT.

By President: The Plaintiff, now Appellant, issued a summons against the Defendant, now Respondent, on the 11th June, 1925, which was withdrawn by formal written notice on 4th July of the same year.

The notice of withdrawal did not embody a consent to pay the costs in terms of Rule 2 (2) of Order 18 of the Magistrate's Courts Proclamation.

On the 26th August, 1927, the Plaintiff again issued a summons against the Defendant for substantially the same cause of action.

On the 12th September the Defendant applied to the Court for an order restraining the Plaintiff from proceeding with the action until the costs of the previous case, which had been taxed on 31st August, 1927, had been paid.

The Magistrate made an order in terms of this application. It is against this order that the appeal has been noted.

Though no order for payment of these costs was made in terms of Rule 2 (2) of Order 18, the Magistrate held that the Plaintiff had agreed to the costs being taxed and that this acquiescence placed these on the same footing as costs awarded by the Court.

The acquiescence upon which the Magistrate relies is contained in certain correspondence put in wherein it is stated that the Plaintiff's attorney had intimated to the Defendant's attorney that he had no objection to the taxation of the bill of costs and would leave the matter of the correctness or otherwise of the items to the Clerk of the Court.

There is, as was pointed out in the case of *Pohlmann versus Schultz* (1925 E.D.L. 371) a wide distinction between a case of costs due on judgment and costs due on mere agreed taxation or ascertainment, the latter being merely an admitted debt on which the creditor cannot proceed to execution.

This Court is asked to construe the discussions as disclosed in the correspondence between the parties as a consent to pay the previous costs without an order of Court, but in the view which this Court takes of the matter it is not necessary to determine that point.

It was stated in the case of Pohlmann *versus* Schultz (*supra*) that no case had been cited nor had the Court been able to find one in which a stay of proceedings had been granted without a previous judgment existing in the applicant's favour.

In the same case the learned Judge in the course of his judgment quoted van Zyl's Judicial Practice as follows:— "On the withdrawal of a summons no fresh summons can be issued until the Defendant's costs of the former summons have been paid, that is, if there has been an order for costs, otherwise not." This principle, which had been approved in the earlier case of Marincowitz *versus* Matthys (12 S.C. 176) has been incorporated in Rule 2 (2) of Order 18 with the proviso that where the plaintiff in the notice of withdrawal embodies in such notice a consent to pay the costs, such consent shall then have the force of an order of Court. As the Defendant has not availed himself of the rules whereby he could have obtained an order of Court restraining the Plaintiff from proceeding until the previous costs had been paid, this Court is of the opinion that the order made by the Magistrate cannot stand.

The appeal will accordingly be allowed with costs and the order made by the Magistrate will be set aside with costs.

By consent of parties the time in which the Defendant may file his plea, objection, exception or other defence to this action is extended for one month from this date.

1923, July 12.

Umtata.

MCAPUKISO *vs.* CEKISO.
(Umtata Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and P. G. Armstrong as Assessors.

Practice—Appeal—When order overruling exception not appealable.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: This is an action before the Magistrate's Court at Umtata, in which the Plaintiff, now Respondent, called upon the Defendant, now Appellant, to transfer to him, pursuant to an agreement of purchase and sale, all his right, title and interest, in and to building Lot No. 2000 in Location No. 5 in the District of Umtata.

The Defendant excepted to the Plaintiff's summons on the grounds—

- (1) that the general jurisdiction of the Magistrate does not include the power of a specific performance judgment in terms of the prayer;
- (2) that the question of land disputes is a matter which the Magistrate cannot try judicially since the jurisdiction in respect thereof is vested in the Chief Magistrate.



- (3) that this Court has no jurisdiction to give an order as prayed for in the summons since that is a matter which must be subject to the Chief Magistrate's approval, and this Court in giving an order as prayed for would be exercising a right which by Proclamation is vested in the Chief Magistrate.

The Magistrate overruled the exception with costs, and the Defendant has appealed.

This Court, *mero motu*, raised the question whether the ruling of the Magistrate is, at this stage, appealable. From a consideration of the authorities it appears to this Court that an appeal does not lie from an order overruling an exception, unless prejudice can be shown which cannot be repaired at a later stage.

The test seems to be does the ruling dispose of the dispute between the parties, for the time being at any rate? In the opinion of this Court it does not.

In the case of *Smith versus James* (1907 T.S. 447), the Chief Justice stated that a final order is one settling the dispute between the parties, and that in that case the excipient should have proceeded with his action and when he had done so, an appeal would lie from the Magistrate's decision if it went against him, but that it did not lie yet.

In the case of *McLaren versus Wasser* (1915 E.D.L. 153) in which it should be noted that there was no appearance for the Respondent, Mr. Justice Hutton said, "supposing that an exception is taken to a summons, and that exception is dismissed, this is not a final order, and therefore appealable, because the case can still go on. If the Defendant does not win, then, a final order having been given, he can come to this Court and take the point which has now been attempted to be taken." The learned Judge also pointed out that the words in the Magistrate's Court Act "final or definitive sentence" have received interpretation in quite a number of cases, and the interpretation is this: that where the effect of the order is to put an end, for the time being, to the matter in dispute between the parties, then it is appealable.

In the case of *Lyons versus Watson* (1915 E.D.L. 182) it was held that a Magistrate's decision dismissing with costs an exception to the summons in an action for libel and slander was not a final and definitive sentence within the meaning of Section 25 of Proclamation 110 of 1879, and not to be appealable.

It is not necessary for the purpose of this case for the Court to say whether it would or would not hear an appeal against a decision overruling an exception where it is clearly shown that irreparable injury or prejudice would ensue by a refusal to do so. In the present case it has not been shown that the Appellant will suffer irreparable injury or prejudice by proceeding with the action in the Magistrate's Court. The Supreme Courts have pointed out on more than one occasion that they do not favour multiplicity of appeals.

In the opinion of this Court the ruling of the Magistrate is not such a final or definitive sentence as to be appealable.

The appeal will accordingly be dismissed with costs.

The judgment of the Native Appeal Court was taken on review to the Supreme Court of South Africa, Cape of Good Hope Provincial Division, and on 29th October, 1923, the following judgment was delivered:—

Searle, J.P.: This is an application by a certain Mbande, a native, for the review of a decision of the Chief Magistrate of the Native Appeal Court at Umtata.

One Cekiso, a native, the Respondent in this application for review, brought a case against Mbande in which he claimed transfer of certain land, and certain exceptions were taken in the case in the Magistrate's Court. These exceptions related to the jurisdiction of the Magistrate. It was said that the Magistrate had not the power to give the specific performance asked for in the summons, and that he had not the jurisdiction to try questions of land disputes. The Magistrate overruled those exceptions. Then, instead of going on with the case in the Magistrate's Court and filing a plea, Mbande, the Defendant, appealed to the Chief Magistrate in the Native Court of Appeal at Umtata, against the decision of the Magistrate overruling the exceptions that he, the Defendant, had taken in the case. The Native Appeal Court raised the question, of its own accord, as to whether the ruling of the Magistrate was at that stage appealable. The Chief Magistrate said "From a consideration of the authorities, it appears to this Court that an appeal does not lie from an order overruling an exception unless prejudice can be shewn which cannot be repaired at a later stage." The appeal was dismissed on those grounds without the merits of the case being gone into.

This application for review is brought on the ground that the Native Appeal Court wrongly decided that no right of appeal lay from the decision of the Magistrate, and wrongly refused to consider the appeal, and the preliminary point is taken that this is not a reviewable matter, that if an appeal was allowable from the Chief Magistrate, this would be an appealable matter, but that under Section 3 of Act 26 of 1894 there is no appeal from the Chief Magistrate. That position as to appeal is candidly admitted, and the matter is now brought before us for review. Mr. Lange argues that this preliminary point is not a good point, and he refers to the case of *Clegg versus Greene* (11, Supreme Court, p. 352). In that case there had been an appeal to the Chief Magistrate in an action in which the Magistrate had given judgment against a Co-respondent in a case where adultery had been alleged, and the Chief Magistrate reversed the decision of the Magistrate on the ground that the latter had no jurisdiction in the suit. The Chief Justice said that, "If the Court below, after hearing the appeal, has decided against the Appellant upon a matter of fact or of law, there would have been no appeal to this Court. But the Court below refused to hear the appeal, and this refusal is, in my opinion, such an irregularity as to constitute a ground of review." Well, to some extent, perhaps, that case does support Mr. Lange's argument. It might be said in that particular case that

what the Chief Magistrate had done was to make a mistake in law. But he did not go into the merits of the case, because he thought the Magistrate had no jurisdiction to hear the case. Therefore, this present case does not seem to me to be on all fours with the case of *Clegg versus Greene*, because in this case it certainly could not be said that there was any irregularity causing a total denial of justice. This is a case where the Magistrate in the Court below no doubt would have been quite willing to go into the merits of the case, and the Chief Magistrate agrees that it is for him so to do. Mr. Lange endeavours to distinguish on this ground, that this is a matter of procedure rather than going into the merits of the case. I am not prepared to say that if a Magistrate makes a mistake, even in a matter of procedure, that this is necessarily a gross irregularity. It may under certain circumstances be a gross irregularity, but I am not prepared to say that every mistake in a matter of procedure is a gross irregularity. Now, here it has always been a somewhat difficult question to decide under what, if any, circumstances, the matter of overruling an exception which does not decide the action fully, is appealable. There have been a number of decisions on the point, and the practice apparently has not been quite uniform in the Transvaal and in this Court. The Transvaal Court seems to have taken a stricter view than this Court in holding that there can be no appeal on an exception, under any circumstances when an exception, which does not go to the root of the matter, is overruled. I am referring to exceptions taken in Magistrates' Courts. Anyhow, it seems that the question is one of law. It is a question of law whether it is an interlocutory matter and not appealable, or whether it is an appealable matter.

This case raises a matter which, after all, can be remedied later on. It is not a case where, as in the case of *Clegg versus Greene* it might be said that there had been irreparable damage by what the Chief Magistrate had done in the matter in the way in which he treated and dealt with the case, but this is only a matter as to whether the Chief Magistrate should or should not have gone into an exception a matter which can always be done afterwards in the Court below. I think, following the case of *Makalima versus Gubanza* (1918 C.P.D. p. 58), that we ought to hold that there can be no review in a matter of this character. That was a very important case, for, in a claim between natives for cash lent and goods supplied, the Chief Magistrate held that the claim must be decided according to native law, that according to that law there was no prescription of such a claim, and that therefore the Prescription Act of 1861 did not apply. The decision was very wide and far-reaching, but the Court was compelled to hold that that was no more than a mistake in law, if it was a mistake, and that for mere mistakes in law there is no remedy. I am, therefore, of opinion that relief cannot be given here by way of review.

There is no gross irregularity in the case, and therefore the application must be dismissed with costs.

Gardiner, J.: I concur.

1923, November 21.

Butterworth.

MAZWI *vs.* TONTSI.
(Butterworth Case.)

Before J. M. Young, A.C.M., President, with R. J. Macleod
and M. G. Apthorp as Assessors.

*Practice—Native Appeal Court—Objections to hearings of
Appeal must, where possible, be filed prior to the sitting
of the Court.*

The facts are immaterial.

JUDGMENT.

By President: Mr. Webb, for Respondent, hands in preliminary objection to the hearing of the appeal as follows:—

“ The Respondent objects that the Appellant has no right to note an appeal in this case, and has no right to prosecute the same for that he, the Appellant, did, subsequently to judgment, and before the noting of the appeal, call upon the Respondent’s attorney and did ask him to make out his bill of costs in the action, which was done, and did ask for time for the settlement of the principal and costs of the action, which was given to him, and did promise and agree to settle the principal and costs of action on the 2nd October, 1923, if such time was given to him, for which purpose his congregation were holding meetings to obtain contributions and did further say that some of his people wanted to appeal, but there were no grounds for such appeal, and in this way the Appellant did acquiesce in the said judgment and is precluded by law from prosecuting his appeal.”

In the case of Simon P. Gasa *versus* Spurgeon Gasa heard in the Appeal Court at Umtata, on the 16th March, 1921, (4 N.A.C. 162) the President stated:—

“ It is to be regretted that a copy of this objection was not lodged prior to the sitting of the Court. In future, where objections of this nature, can be, but are not so filed, the Court may refuse to hear them.”

Under the circumstances the Court will not hear the objection.

1925, December 7.

Kokstad.

PAKKIES *vs.* KIVIET.
(Mount Currie Case.)

Before W. T. Welsh, C.M., President, with R. D. H. Barry
and F. E. G. Munschied as Assessors.

*Objection to summons—To be timeously taken—Order XII,
2nd Schedule, Proclamation 145 of 1923.*

Plaintiff sued Defendant for the maintenance of his (Defendant’s) wife whom he had married by Civil rites and left with the Plaintiff. He did not state specifically in his summons whether he was suing under Native Custom or Common law. Subsequently in his evidence he stated he was

suing under the latter. Defendant thereupon applied for the dismissal of the summons on the ground that Plaintiff was not the proper person to sue. His objection was not timeous in view of Section (1) of Rule 1, Order XII, 2nd Schedule, Proclamation 145 of 1923, but the Magistrate allowed it to be taken—apparently in terms of Section (2) of the same Rule—and dismissed the summons. Plaintiff appealed.

Defendant, Respondent on appeal, contended that he could not have objected *ab initio* as the summons did not disclose the fact that the claim was under Common law.

JUDGMENT.

By President: Section 104 (1) of Proclamation 145 of 1923 provides that it shall be in the discretion of the Court in civil suits and proceedings between natives involving questions of customs followed by natives to decide such questions according to the Native law applying to such customs.

In this Court's opinion it therefore follows that actions not falling within these terms should be decided according to Common law.

As the plea admits that the marriage of Defendant to Plaintiff's daughter was contracted according to Colonial law the former was in a position to object to the summons as provided by Order XII. Even assuming that the Defendant was in doubt, a difficulty which this Court does not share, further particulars could have been applied for as provided by Order X.

It does not necessarily follow that the Plaintiff in the circumstances disclosed has no right of action against the Defendant.

This Court is therefore of opinion that the objection taken should not have been allowed.

The appeal will be allowed with costs, the Magistrate's ruling will be set aside and the case returned to be heard on its merits, costs in the Court below to abide the issue.

(*Note.*—As to the effect on Native Custom of marriage by civil rites see the case *Nkomentaba versus Mtimde*.*)

1925, March 14.

Umtata.

SHUDE *vs.* SHUDE AND KOOTIE. (Xalanga Case.)

Before J. M. Young, A.C.M., President, with F. N. Doran and R. C. E. Klette as Assessors.

Application to amplify Grounds of Appeal—Refused—Inadmissible evidence—Objection should be made at trial, Evidence—Oral, in regard to written document—Admissible in suit between persons not parties to document.

The facts are clear from the judgment of the Native Appeal Court.

* Page 127 of these Reports.

JUDGMENT.

By President: The Appellant sued the Respondent for damages for trespass and injury to his property. He alleged that he was the owner, under grant from the Crown of a certain building lot in the District of Xalanga on which a house stands and that the Respondents unlawfully and maliciously trespassed on the lot and damaged the house in question by removing therefrom the roof and timbers.

It is admitted by the Respondents that the house has been demolished as alleged but they say that it was done with Appellant's consent. They state that the house and lot formed part of the estate of their late father, that all the property in the estate, including the land, was bequeathed to their mother, now deceased, and after her death to the sons and daughters of the marriage, that at the time of the last survey of the Xalanga District the building lot was apportioned to the Appellant on the understanding that the house on it did not go with the allotment but remained the property of the estate, and that it was subsequently agreed to dismantle it and divide the material amongst those heirs who did not get a share of the land.

The Magistrate found that Respondents had proved the agreement that the house was not to become Appellant's and that he had consented to its demolition, and entered judgment for Respondents.

Against this judgment an appeal is brought on the following grounds:—

- (a) that the judgment is contrary to law;
- (b) that the oral evidence admitted varying the conditions of the title and burdening the property thereby conveyed to Appellant is inadmissible.

Mr. Hemming, for Respondents excepts to ground (a) of the Notice of Appeal in that it does not state clearly and specifically in what particular or in what respect the judgment is contrary to law and thus does not comply with Rule 2 (3) (b) of Order No. XXIX of Proclamation No. 145 of 1923. Mr. Muggleston, for Appellant, applies for leave to amend and amplify the grounds of appeal by adding thereto a further ground of appeal, namely:—"that the judgment is against the weight of evidence" and by inserting, after the words "that the judgment is contrary to law," the words "in that, even if the findings of the Magistrate are accepted, they do not justify or support the application and interpretation of the law as applied by the Magistrate, and, further, that the Magistrate has overlooked and failed to appreciate the legal position and Plaintiff's rights to the building and the necessity of absolute proof of Plaintiff's unequivocal consent to the violation of such rights."

The only reason advanced for failure to comply with the Rule is that the Appellant's representative in the Magistrate's Court was under a mistaken impression that the ground given was sufficient.

It has been decided on numerous occasions that to state that a judgment is contrary to law is not sufficient compliance with the Rule, and it seems strange that the Appellant's Attorney should be unaware of these decisions seeing that the Rule requiring the grounds of appeal to be clearly and specifically stated has been in force since the promulgation of Proclamation No. 144 of 1915.

The Court, without wishing to lay down whether it can and in what circumstances it would, allow an amplification of or addition to the grounds of appeal originally given, is of opinion that, even if it has the power to allow such amendments, it is one which should be exercised with discretion, and it has come to the conclusion that no good cause has been shewn for granting the indulgence asked for and that this is not a case in which it can use such a discretion.

The Appellant's application must therefore be refused. The Respondent's objection is allowed with costs and ground (a) of Notice of Appeal expunged.

With regard to the remaining ground of appeal, no objection to the admission of the evidence complained of appears to have been taken at the trial, and it is questionable whether the matter can be considered now. However, as no serious objection has been raised to its being dealt with, it has been considered.

It is true that as a general rule oral evidence is not admissible to add to or vary a written document, but there are certain exceptions and one of these is where the person who wishes to produce such evidence is not a party to the document (*Treasurer General versus Lippert*, 1 S.C. 291).

In this case the lot in question was granted to the Appellant by the Crown and title issued to him under the provisions of Proclamation No. 241 of 1911 as amended by Proclamations Nos. 44 of 1912 and 111 of 1913. The Respondents are therefore not parties to the document and, in the opinion of this Court, the evidence given by them as to what took place in regard to the house prior to the grant of the land to the Appellant was rightly admitted.

The appeal is dismissed with costs.

1925, April 3.

Kokstad.

NKOMENTABA *vs.* MTIMDE.
(Matatiele Case.)

Before W. T. Welsh, C.M., President, with H. E. Grant and F. H. Brownlee as Assessors.

Practice—Application to add further ground to Notice of Appeal—Granted—Jurisdiction of Magistrate's Courts. Section 29, Proclamation 145 of 1923 and Section 6 (2), Proclamation 142 of 1910—Actions against Co-respondent for damages for adultery—Marriage according to Christian Rites—Native Custom or Colonial Law—Which to apply—Section 104 (1), Proclamation No. 145 of 1923—Adultery—Prescription.

The facts are clear from the judgment of the Native Appeal Court.

Ref. to
937 (T. & N) 40.

JUDGMENT.

By President: Before this Court the Appellant applies for permission to add to his notice of appeal a further ground objecting to the Magistrate's judgment on the award of damages for adultery, in that the Plaintiff's marriage having been solemnized by Christian rites, the Magistrate's Court had no jurisdiction to adjudicate upon the claim. In support of his application he cites the cases of *Mare versus Lukozana* (1907 28 N.L.R. 438), *Maserowitz versus Frith, Sands & Coy.* (1907 T.S. 132), and *Bailie versus Hare* (1910 E.D.L. 141). In view of the fact that the question involved is that of jurisdiction of the Magistrate's Court this Court, having regard to the authorities quoted—the Respondent not objecting—grants the application to include the further ground of appeal.

The Appellant, in his argument, relying on Section 29 of Proclamation 145 of 1923, contends that Section 6 (2) of Proclamation 142 of 1910 excluded the jurisdiction of Magistrates' Courts in actions for damages for adultery where the marriage had been celebrated according to the law of the Colony, in that the action is one relating to or arising out of such a marriage and consequently must be decided in the Court of the Chief Magistrate or in a Superior Court.

The interpretation of Section 6 (2) of Proclamation 142 of 1910 was considered in the case of *Mbadu versus Matshongo* (1920 E.D.L. 143) where the Court in the course of its judgment said that to ascertain the meaning of sub-section (2) of Section 6 of the Proclamation the previous sections must be referred to and that "these are questions of divorce, separation, inheritance or rights of property arising out of native marriages or in regard to the administration and distribution of the estate of any native dying domiciled in the Transkeian Territories without leaving any widow or the issue of any marriage."

If the contention that the jurisdiction of the Magistrate's Court is excluded in actions for damages for adultery where the marriage has been according to Civil rites, on the ground that the question is one relating to or arising out of such a marriage, it must follow that Magistrate's Courts would have no right to adjudicate in cases where a man sues a third party for having defamed, assaulted or caused the death of his wife, a proposition which, in the opinion of this Court, is untenable.

If it had been intended by Section 6 (2) of Proclamation 142 of 1910 to deprive Magistrates' Courts in these Territories, which then had unlimited civil jurisdiction, of the power to hear and determine actions of this nature such intention undoubtedly would have been expressed in clear and unambiguous language. In the opinion of this Court the terms of Section 6 (2) of Proclamation 142 of 1910 cannot be construed to mean that the jurisdiction of Magistrates' Courts is excluded in actions against a third party for damages for adultery where the marriage was one according to Civil rites, nor is it prepared to agree to the contention that Section 29

of Proclamation 145 of 1923 was intended to oust the jurisdiction of Magistrates' Courts in cases of this kind. In its opinion this exclusion was deliberately omitted from Section 37 of the Proclamation.

It therefore follows that this ground of appeal fails.

In regard to the merits of the case the Plaintiff claimed—

- (1) delivery of a girl named Violet, and
- (2) payment of 15 head of cattle or their value £75 as and for damages for continuous adultery.

In his statement of claim the Plaintiff avers—

- (1) that he married his wife Rhoda by Christian rites, after payment of dowry;
- (2) that the said marriage still subsists;
- (3) that a girl Violet was born to his said wife during the subsistence of their marriage;
- (4) that the said Violet is a minor and is in the custody and under the control of the Defendant who refuses to deliver her to the Plaintiff though demanded;
- (5) that Defendant had lived in continuous adultery with Plaintiff's wife for many years and has caused her pregnancy on three occasions.

Defendant took exception to the summons in regard to the action for damages in so far as such claim was based upon acts of adultery which took place more than five years prior to the issue of summons, on the ground that such claim is prescribed. This exception was overruled by the Magistrate.

Defendant then, *inter alia*, pleaded:

- (1) the the Plaintiff married Rhoda by Christian rites and Colonial law applies to their marriage;
- (2) That Plaintiff about 1897 abandoned and rejected his wife Rhoda and thereafter Plaintiff lived with one Agnes Nquge as his wife, Defendant with Plaintiff's knowledge, taking Rhoda to wife and living with her for many years; that three children, Isabella, Violet and a boy (deceased) were born to Rhoda of which Defendant is the father;
- (3) that thereafter Plaintiff again lived with Rhoda his wife but later rejected her and again lived in adultery with another native woman, Rhoda returning to Defendant, lived with him as his wife, and Plaintiff instructed Rhoda on this occasion to inform Defendant that he could have and keep Isabella and Violet which offer Defendant accepted. Thereafter Plaintiff again took Rhoda to live with him;
- (4) that by virtue of the above stated facts and of the abandonment and treatment of Rhoda by Plaintiff and of collusion and condonation on Plaintiff's part and Plaintiff's own misconduct he is entitled to no damages neither is he entitled to an order for the return of Violet.

Defendant counterclaimed from Plaintiff an order declaring him to be entitled to Isabella and Violet and to the dowries to be received for them by virtue of the fact that Defendant is their natural father and the agreement related in paragraph 3 of the plea.

After hearing evidence, the Magistrate gave judgment as follows:—

“ The claim in reconvention is dismissed with costs—the girls Isabella and Violet being declared Plaintiff’s. For Plaintiff for 3 head of cattle or £15 and costs— also custody of the child Violet.”

The main point argued before this Court is whether or not the cause should have been determined in accordance with Colonial Law or Native Custom.

Section 104 (1) of Proclamation No. 145 of 1923 enacts that “ it shall be in the discretion of the Court in civil suits or proceedings between natives involving questions of customs followed by natives to decide such questions according to the native law applying to such customs.”

The Appellant contends that the Plaintiff in the Court below, by contracting a Christian marriage, contracted himself out of the operation of Native Custom and quotes *inter alia* in support of his contention the case of T. Magudumana *versus* Sibaca (III N.A.C. 4) which lays down that Colonial Law must apply in actions for adultery arising out of Christian marriages.

The Respondent argues that the cause should be tried under Native Custom and quotes *inter alia* the case of Edward Tshipa *versus* Simon Letsobela (IV N.A.C. 4). In that case on the question of whether Colonial Law or Native Custom should prevail the Court held that the Magistrate was justified in the circumstances disclosed in exercising the discretion vested in him to decide the case according to Native Custom by virtue of the provisions of Section 23 of Proclamation No. 112 of 1879 which in its application to the point at issue provides that “ the Magistrate shall have jurisdiction in all suits and proceedings. All such suits and proceedings shall be dealt with according to the law in force at the time in the Colony of the Cape of Good Hope, except where all the parties to the suit or proceeding are what are commonly called Natives in which case it may be dealt with according to Native Law.”

Since the hearing of that case, however, Section 23 of Proclamation No. 112 of 1879 has been repealed, its provisions being superseded by those of Section 104 (1) of Proclamation No. 145 of 1923 which entirely alters the basis of the application of Native Custom and restricts it to questions of Native Law.

In the present case the Plaintiff, by contracting a marriage under Christian rites, has, in the matter of marriage, ceased to follow Native Custom and, in the opinion of this Court, his action for damages for adultery must be dealt with according to Colonial Law.

It having been ruled that Colonial Law applies it follows that the law of prescription operates. According to the record the cause of action arose some fifteen years ago and therefore became prescribed five years thereafter.

The Court having ruled that the claim for damages for adultery is prescribed it is unnecessary for it to consider the further grounds upon which the appeal against the judgment for damages is based.

It is clear that the Magistrate's order declaring the girls Isabella and Violet to belong to the Plaintiff is based upon Native Custom which this Court does not apply in this case.

The appeal is allowed with costs and the judgment of the Magistrate altered as follows:—

On the claim for damages—judgment for the Defendant with costs; absolution from the instance in regard to the claim for the girl Violet.

The appeal against the judgment in reconvention is upheld with costs and the Magistrate's judgment altered to one of absolution from the instance.

*Dissenting judgment by F. H. Brownlee, Esquire, Magistrate, Mount Ayliff, on the question of the Magistrate's jurisdiction:—*Section 29 of Proclamation No. 145 of 1923 subjects a Magistrate's jurisdiction to the provisions of Section 6 (2) of Proclamation No. 142 of 1910. The wording of the latter Section clearly excludes from the Magistrate's jurisdiction all questions "relating to or arising out of any marriage contracted according to the law of the Colony" and its wording permits of no doubt as to its intention.

In the interpretation of laws "the intention of the Legislature must be sought in the actual words wherein the Legislature thought fit to express its intention" (Nathan, vol. III, page 1101).

Section 6 (2) of Proclamation No. 142 of 1910 confers a power and jurisdiction and imposes a duty upon the Court of the Chief Magistrate. No contrary intention appearing in this Section the Court of the Chief Magistrate must perform the duty imposed upon it and exercise the jurisdiction conferred upon it [*vide* Section II, sub-sections (1) and (2) of Act 5 of 1910].

I consider therefore that the Appellant's contention that this cause is not within the Magistrate's jurisdiction to be correct.

I concur in the rulings of my learned brothers upon the other matters at issue in this case.

1925, December 5.

Kokstad.

JAJILE *vs.* MAKUKUMELANA.

(Mount Frere Case.)

Before W. T. Welsh, C.M., President, with R. D. H. Barry
and F. E. G. Munscheid as Assessors.

*Application to file fresh Notice of Appeal—Neither good
cause shown nor proposed new grounds of appeal dis-
closed—Refused.*

Appellant by notice alleged that his Notice of Appeal was defective and applied for leave to expunge it from the record and to substitute a fresh notice. He did not disclose what his fresh grounds of appeal were.

JUDGMENT.

By President: There is nothing before this Court to show what further grounds of appeal the Appellant wishes to put forward nor why these were not stated in the original notice lodged on 30th July last. It seems clear from the authorities which have been consulted that before an application of this nature is granted good cause must be shown, and this, in the opinion of the Court, has not been done. The application is refused with costs.

1926, March 8.

Umtata.

MARILIKA AND MABOHLA *vs.* MDUNYELWA.

(Umtata Case.)

Before W. T. Welsh, C.M., President, with H. E. F. White
and R. C. E. Klette as Assessors.

*Grounds of appeal—Objection not pleaded as a defence in
Trial Court as required by Order XIV, Rule 1 (1) of
Proclamation No. 145 of 1923 upheld.*

Plaintiff sued Defendants for £20 damages for seduction and pregnancy of his sister, who married before child was born.

Defendants' plea was a denial of the seduction and pregnancy and a statement that Defendants paid a beast in accordance with Native Custom, pending the birth of the child. The ground of appeal objected to was—"That the judgment is wrong in law since the Magistrate has not observed the position in view of the facts, that it was quite possible that the child was that of the woman's husband and must be presumed to be such in law."

After argument Mr. Henning's objection that ground of appeal No. 2 was not pleaded as a defence in the trial court is upheld with costs.

1923, November 22.

Butterworth.

NTLOKO *vs.* NTLOKO.

(Tsomo Case.)

Before J. M. Young, A.C.M., President, with R. D. H. Barry and R. J. Macleod as Assessors.

Practice—Grounds of Appeal must comply with Proclamation 144 of 1915.

The facts are immaterial.

JUDGMENT.

By President: Mr. Clark, for Respondent, objects to the appeal being heard for the reason that the notice of appeal does not comply with the requirements of Proclamation No. 144 of 1915, since it does not explicitly state the special grounds on which the appeal is based.

Mr. Webb, in reply, is in accord with this view except in so far as the ground of appeal contained in paragraph 2 (*b*) is concerned and which reads as follows:—

“That the Assistant Magistrate failed to give judgment in accordance with the weight of evidence adduced.”

It is contended that this reason for appeal is a sufficient compliance with the rules.

In view of numerous decisions of this Court on the point and having regard to the ruling in the case of *Levisieur versus Frankfort Boere Ko-operatieve Vereeniging* (80, O.P.D. 1921), this Court is of opinion that the whole exception as taken should be allowed. The case is accordingly struck off the roll with costs.

Note: See the decision in the following case of *Nzondo versus Nqabeni*.

1924, July 16.

Umtata.

NZONDO *vs.* NQABENI.

(Qumbu Case.)

Before W. T. Welsh, C.M., President, with W. Carmichael and E. W. Bowen as Assessors.

Practice—Appeal, grounds of—Order XXIX, rule 2 (4) (b), Proclamation No. 145 of 1923.

The Respondent filed an exception in the following terms: “Respondent excepts to the Notice of Appeal in terms of Order XXIX 2 (4) (*b*) of Proclamation No. 145 of 1923 on the grounds that the ground of appeal is not clearly and specifically stated.”

JUDGMENT ON EXCEPTION.

By President: The Notice of Appeal states that the judgment is against the weight of evidence and probabilities. This Court in the cases of Ngikilitye Ngukumba *versus* Sigwebo Qala (4, N.A.C. 243) and S. Ntloko *versus* J. Ntloko heard at Butterworth in November, 1923,* in construing Proclamation No. 144 of 1915 held that to state that a judgment is against the weight of evidence and probabilities is not a compliance with the rule. Rule 2 (4) (b) of Order No. 29 of Proclamation No. 145 of 1923 is identical with Rule 2 (4) (b) of Order No. 30 of Act No. 32 of 1917 and differs from the provisions of Proclamation No. 144 of 1915. In the case of Griffiths *vs.* Herschel Motor Engineering Works (1920, C.P.D. 389) it was decided that a notice setting forth as a ground of Appeal that the judgment is contrary to the evidence is a sufficient compliance with the rule. In that case the Court in the course of its judgment explained that it is impossible to state why a finding on facts is against the weight of evidence because that would involve setting out the whole of the argument. The ruling in the cases of Ngikilitye Ngukumba *versus* Sigwebo Qala and S. Ntloko *versus* J. Ntloko (*supra*) followed the decision in the case of Levisieur *versus* De Frankfort Boere Ko-operatieve Vereeniging (1921, O.P.D. 80), but this Court feels constrained to follow the decision of the Cape Provincial Division of the Supreme Court in the case of Griffiths *versus* Herschel Motor Engineering Works (*supra*).

The exception is accordingly overruled with costs.

JUDGMENT.

By President: The Magistrate has believed the evidence adduced on behalf of the Plaintiff and this Court cannot say he erred.

The Appeal is dismissed with costs.

1924, November 11.

Butterworth.

CETYWAYO *vs.* QONDANI.

(Willowvale Case.)

Before W. T. Welsh, C.M., President, with R. D. H. Barry and R. J. Macleod as Assessors.

Procedure—Order XXIX 2 (4) (a), Proclamation No. 145 of 1923—Appeal against judgments in convention and reconvention—Notice of Appeal should specify whether the whole or a part only of the judgment is appealed against.

The facts are immaterial.

* Page 133 of these Reports.

JUDGMENT.

By President: In this case Mr. Warner, on behalf of the Respondent, applies that the appeal be struck off the roll with costs on the ground that the notice of appeal does not comply with Order XXIX 2 (4) (a) of Proclamation No. 145 of 1923.

This rule requires that an Appellant shall state whether the whole or part only of the judgment or order is appealed against, and, if part only, then what part.

In his grounds of appeal the Appellant has attacked both the judgment in convention and that in reconvention, but has not stated whether the whole or part only of either or both these judgments is appealed against.

Rule 2 (4) (a) of Order XXIX of Proclamation No. 145 of 1923 is identical with Rule 2 (4) (a) of Order 30 of Act No. 32 of 1917.

In the case of *De Beer versus Beets* (1919, C.P.D. 260) it was ruled that in addition to stating the grounds of appeal specifically it must also be stated whether an appeal is against the whole judgment or only against part of the judgment. In the case of *Badenhorst versus Coetzee* (1920, South-West Africa Law Reports, 72) the Court in upholding a similar objection said: "Then there is a further objection that the same Order in Rule 1, sub-section 4, has not been complied with in so far as the notice of appeal does not set out whether the whole or only part of the judgment has been appealed against. It appears at first sight that the objection is a highly technical one, but on the other hand it is conceivable that an objection like this may be of the utmost importance, not only to the Respondent, but also to the Magistrate, who has to frame his statement of reasons, and also for the Court of Appeal, which has to deal with those reasons and with the arguments of counsel, and it seems that in the circumstances of this case that objection is also an important one." In the case of *Indersingh versus Bholasing* (Justice Circular for February, 1923) a similar objection was upheld by the full Bench of the Natal Provincial Division of the Supreme Court as the notice of appeal, although it stated the specific grounds of appeal, did not state whether the whole or part only of the judgment was appealed against and if part only then what part.

In view of these decisions this Court is of opinion that the objection taken is a good one and must be upheld. The appeal is accordingly struck off the roll, with costs against the Appellant.

1925, March 3.

Butterworth.

GONIWE *vs.* MPONDOMBINI.
(Willowvale Case.)

Before J. M. Young, A.C.M., President, with W. O. Blake-
way and R. D. H. Barry as Assessors.

*Practice—Notice of Appeal—Rule 2 (4) (b), Order XXIX,
Second Schedule, Proclamation No. 145 of 1923.*

Decision on Application:—An application was made by the Respondent's Attorney for the removal of the appeal from the roll for the reason that the notice of appeal did not state in what way the Magistrate erred in his construction of Native Law in the premises.

The Court deleted the paragraph objected to and ordered the appeal to proceed on the other grounds of appeal stated in the notice.

1925, November 10.

Butterworth.

NOLEYI AND NKWENKWE *vs.* MOUNTAIN.
(Idutywa Case.)

Before W. T. Welsh, C.M., President, with F. H. Brownlee
and G. D. S. Campbell as Assessors.

*Practice—Notice of appeal should state whether whole or
part only of judgment is attacked. Rule 2 (4) (a),
Order XXIX, 2nd Schedule, Proclamation No. 145 of
1923—Objection to notice of appeal sustained, but leave
granted to amend.*

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In reply to Plaintiff's summons Defendant filed a fourfold exception and the Magistrate entered judgment as follows:—"Exception No. 1 upheld with costs." Plaintiff appealed against "... the decision of the Magistrate ... upholding the Defendant's exception ... and thus dismissing the Plaintiff's summons."

Respondent objected to the notice of appeal in that it did not state whether the whole or part only of the judgment was appealed against as required by Rule 2 (4) (a), Order XXIX, Second Schedule, Proclamation No. 145 of 1923.

Ruling on Exception.—In the case of Cetywayo Dingana *versus* Qondani Zabezolo, heard before this Court at Butterworth on 11th November, 1924,* an objection similar to the one now taken by Mr. Warner to the hearing of this appeal was heard when the question in issue was considered.

This Court then held, after considering the authorities available, that the objection was a good one and had to be upheld.

This Court is not prepared to vary that decision as in its opinion the rule is peremptory.

The objection is accordingly upheld and the appeal is struck off the roll with costs.

Thereafter Appellant applied (on notice) to amend his notice of appeal to conform with the rule.

Order on Application: Mr. Hemming, for Appellant, applies for leave to amend the notice of appeal to conform with the rule. The Respondent not objecting the application is granted and the appeal set down for hearing at the next session of this Court at Butterworth.

1926, March 9.

Umtata.

MAKANZI *vs.* MASUMPE.

(Qumbu Case.)

Before J. M. Young, A.C.M., President, with H. E. F. White and R. C. E. Klette as Assessors.

Practice—*Notice of Appeal should state whether whole or part only of judgment attacked*—Rule 2 (4) (a)—Order XXIX, Proclamation No. 145 of 1923.

The facts are immaterial.

JUDGMENT.

By President: Mr. Hemming, on behalf of the Respondent, applies that the appeal be struck off the roll with costs on the ground that the notice of appeal does not comply with Order XXIX, 2 (4) (a) of Proclamation No. 145 of 1923.

Following the ruling in the case of Noleyi Bangiso and Another *versus* Mountain Sangqu, heard before this Court at Butterworth on the 10th November, 1925,† the objection is upheld and the appeal is struck off the roll with costs.

Order on Application: Mr. Trollope, for Appellant, applies for leave to amend the notice of appeal to conform with the Rule—the Respondent not objecting, the application is granted, and the appeal set down for hearing at the next session of this Court at Umtata.

* Page 134 of these Reports.

†Page 136 of these Reports.

1925, July 7.

Umtata.

BUTANA *vs.* GECE.
(Tsolo Case.)

Before J. M. Young, A.C.M., President, with G. M. B.
Whitfield and W. C. H. B. Garner as Assessors.

*Practice—Notice of Appeal—Security to be given within
21 days of date of judgment.*

The facts are immaterial.

JUDGMENT.

By President: Rule No. 2 (1) of Order No. 29 of Proclamation No. 145 of 1923 provides that an appeal may be noted within twenty-one days after the date of the judgment appealed against.

Rule No. 2 (2) of the same Order provides that an appeal shall be noted by the delivery of notice and by giving security for the Respondent's costs of appeal to the amount of five pounds.

Judgment was given on the 24th April, 1925. Notice of appeal was delivered on the 19th May, the last day allowed for noting. Security was not deposited until the 29th May, 1925, ten days after the time allowed for noting had expired.

As the appeal has not been "Noted," i.e., Notice delivered and security found, within the time allowed by the rules the grounds of appeal cannot be considered.

The case is struck off the roll with costs.

1927, November 17.

Butterworth.

NQANUKA *vs.* WEWANA.
(Willowvale Case.)

Before J. M. Young, A.C.M., President, with F. H. Brownlee
and W. F. C. Trollip as Assessors.

*Practice and Procedure—Notification of appeal—Security—
Rule 2 (2) Order XXIX Proclamation No. 145 of 1923.*

JUDGMENT.

By President: Rule No. 2 (1) of Order No. XXIX of Proclamation No. 145 of 1923 provides that an appeal may be noted within twenty-one days after the date of the judgment appealed against.

Rule No. 2 (2) of the same Order provides that an appeal shall be noted by the delivery of notice and by giving security for the Respondent's costs of appeal to the amount of £5.

In this case judgment was given on the 29th August, 1927. Notice of appeal was delivered on the 17th September, 1927. Security was not found until the 29th September, 1927. As security was not given within the prescribed twenty-one days no appeal has been noted.

The appeal is accordingly struck off the roll with costs.

1926, March 10.

Umtata.

NONKABATSHULANA AND DAFLOWU *vs.* GXWALA
(Qumbu Case.)

Before J. M. Young, A.C.M., President, with H. E. F.
White and R. C. E. Klette as Assessors.

*Practice—Omission to find security required by Order XXIX,
Rule 2 (2), Proclamation No. 145 of 1923. Application
to condone omission granted subject to security being
furnished within 21 days of order.*

The facts are immaterial.

JUDGMENT.

By President: This is an application for an extension of time in which to note an appeal from the judgment of the Magistrate's Court at Qumbu.

It appears from the documents filed with the application that notice of appeal was lodged with the Clerk of the Court within the time prescribed, but that through an oversight on the part of the Applicant's Attorney, security was not found as required by Order XXIX, Rule 2 (2) of Proclamation No. 145 of 1923. Application is now made to condone this omission and extend the time in which to note the appeal. As the application is not opposed the indulgence will be granted, the appeal to be noted within 21 days of this date. Applicant to pay costs.

1925, April 7.

Lusikisiki.

MTALA *vs.* JULA.
(Tabankulu Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson
and W. C. H. B. Garner as Assessors.

*Practice—Appeal noted late—Formal application should be
made for it to be heard.*

The facts are immaterial.

JUDGMENT.

By President: In this case judgment was delivered on the 14th October, 1924. An appeal was duly noted on 20th November. The Appellant's attorney asks that notwithstanding the time for noting the appeal having expired it be heard in terms of paragraph 74 of Proclamation No. 145 of 1923.

In the absence of a formal application setting forth the grounds this Court, in view of the numerous rulings on the question, is of opinion that the Appellant has no right to be heard.

The case is accordingly struck off the roll.

1926, August 13.

Lusikisiki.

NKWAPA *vs.* NOXANGASEKILE.
(Tabankulu Case.)

Before J. M. Young, Ag. C.M., President, with O. M. Blakeway and E. W. Bowen as Assessors.

Grounds of appeal—Late filing—Consent of parties does not condone.

The facts are immaterial.

JUDGMENT.

By President: In this case judgment was delivered on the 30th April, 1926. On the 19th May, a letter was written to the Clerk of the Court at Tabankulu by Appellant's attorney, intimating that an appeal had been noted. No grounds upon which the appeal was based were furnished until the 2nd July, 1926, on which date a communication was addressed to the Clerk of the Court, enclosing one from the Respondent's Attorney stating that he had no objection to the grounds of appeal being furnished at a later stage.

The words of the Proclamation are clear, and the consent of Respondent's Attorney to the non-observance of the Rule cannot condone the omission or failure to comply therewith.

This Court must adhere to its previous decisions and hold that no appeal has been noted.

The case is struck off the roll with costs.

1927, December 8.

Kokstad.

TUSWA *vs.* (1) NDUNGE (2) MATEZA (3) RAMNCANA.
(Mount Fletcher Cases.)

Before W. T. Welsh, President, with W. G. Wright and H. E. Grant as Assessors.

Procedure—Appeal, noting of—Cases consolidated for hearing—Separate notices of appeal and security must be given in each case.

JUDGMENT.

By President: In these cases three summonses were issued. At the trial the cases were consolidated for hearing, but three separate judgments were recorded. Only one notice of appeal and security in the sum of £5 was given.

The circumstances are similar to those in the cases of Goosen and others *versus* McCullagh (1923, E.D.L.D. 344), where it was held that a separate notice of appeal and security must be given in each case. The notice of appeal will therefore be discharged with costs of the day.

On application being made for leave to appeal this Court, subject to the prior payment of the costs of to-day, grants the applicant leave to note an appeal to the next sitting of this Court, the appeal to be noted within one month from this date and to be made in accordance with the rules applicable thereto.

1927, August 8.

Lusikisiki.

MTSHALI *vs.* SISHUBA.

(Libode Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway
and F. C. Pinkerton as Assessors.

*Practice and Procedure—Failure by Appellant to serve Notice
and Grounds of Appeal on Respondent—Orders 1 (3) (1)
and XXIX 2 (2) and 2 (4) (b) of Proclamation No. 145
of 1923.*

JUDGMENT.

By President: The Respondent objects *in limine* that the Appellant has not complied with the provisions of Order No. 1 Rule 3 (1) and Order XXIX, Rule 2 (2) and 2 (4) (b) of Proclamation No. 145 of 1923, in that he has not delivered to him within 21 days, nor since, a copy of the notice of appeal, together with a statement or copy of the grounds of appeal.

The Appellant's attorney admits that neither notice of appeal nor a statement of the grounds of appeal has been served on the Respondent or his legal representative.

Following the decisions in the cases of Karro and Dansky *versus* Van der Spuy (1919, C.P.D. 293) and Nafte *versus* Dembo and Lipson (1920, Bissett & Smith 20) this Court is of opinion that the appeal has not been properly noted and accordingly allows the objection and orders the appeal to be struck off the roll with costs.

1925, November 10.

Butterworth.

WOKONA *vs.* SIKADE.

(Idutywa Case.)

Before W. T. Welsh, C.M., President, with F. H. Brownlee
and G. D. S. Campbell as Assessors.

*Re-opening of default judgment—What constitutes “wilful
default.”*

The facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: This is an appeal against the Magistrate's order granting leave to re-open a default judgment. It is clear that a summons was issued on 15th August, 1924, and served, in the absence of the Applicant, on his wife at his kraal on 18th idem and that a default judgment was given against him on 5th September, 1924. The Applicant, now Respondent, in his evidence denies having received the summons, and there is nothing to prove that it came to his notice until his

return from the mines in April, 1925. It has been argued that as the Applicant did not leave the district until two days after the summons had been served it should be assumed that it came to his notice, but Rule 2 (1) of Order 28 places the onus on the Respondent in the Court below to prove that the Applicant was in wilful default.

In the opinion of this Court it has not been proved that he was in wilful default in terms of the Rule as interpreted in the cases of *Hitchcock versus Raaff and Klaas versus Kahn* reported on page 356 of *Buckle and Jones* (2nd Edition).

The fact that the Applicant, who has since shown that he had a good defence, left for the mines subsequent to the receipt by him of a demand on the 13th August, 1924, is not in the Court's opinion proof that he made wilful default.

The appeal will be dismissed with costs.

1926, July 20.

Butterworth.

JAKAVULA *vs.* TOTANA.
(Nqamakwe Case.)

Before J. M. Young, Ag. C.M., President, with F. H. Brownlee and G. D. S. Campbell as Assessors.

Summons—"Wilful default"—*What constituted—Rule 2 (1) Order XXVIII of Proclamation No. 145 of 1923.*

The facts are immaterial.

JUDGMENT.

By President: The only question for decision is whether the Applicant's conduct in failing to answer the summons amounted to wilful default within the meaning of, and interpretation placed upon Order XXVIII, Rule 2 (1) of Proclamation No. 145 of 1923.

In the case of the Village Council of Bloemhof *versus* Southey (*South African Law Journal* Vol. XLIII, page 93) it was held that mere neglect or oversight in failing to enter appearance is not necessarily "wilful default." For neglect to amount to wilful default there must be a total and contemptuous disregard of the processes of the Court and of the rights of Plaintiff amounting to an abandonment of whatever defence the Defendant may have or may have thought he had.

This decision is in conformity with the ruling in the case of *Hitchcock versus Raaf* (T.P.D. 1920, 366).

Although the Magistrate has found that the summons was served on his wife, it is doubtful whether the Applicant received it, and as he appears to have a good defence to the action, this Court is of opinion that the Magistrate should have granted the application.

The appeal is allowed with costs and the Magistrate's judgment altered to "Application granted and the default judgment entered on the 16th November, 1925, set aside. Applicant to pay costs."

1927, July 21.

Umtata.

DUNGANE AND DUNGANE *vs.* XESI.

(Engcobo Case.)

Before J. M. Young, A.C.M., President, with R. H. Wilson
and F. N. Doran as Assessors.

*Practice and Procedure—Judgment—Default—Final-
Absence of party—Meaning of.*

JUDGMENT.

By President: The grounds of appeal in this case are two-fold. Firstly, that the judgment should have been a default judgment and secondly, that the judgment is not supported by the evidence. With regard to the first of these grounds, "Default Judgment" is defined as a judgment given in the absence of the party against whom it is made.

The cases in which it is possible for a judgment to be given against a party in his absence are:—

- (1) Where Defendant fails to enter appearance.
- (2) Where he makes default in delivering his plea.
- (3) Where he files a consent to judgment.
- (4) Where either party fails to comply with an order made by the Court under Order XXXII.
- (5) Where either party fails to appear at the trial.
- (6) Where either party though appearing at the beginning of the trial, withdraws or otherwise fails to remain until the judgment.

"Party" means any person who is a party to the proceedings. "Plaintiff," "Applicant," "Respondent" and "Party" include, for the purposes of service notice, appearance, endorsement and signature, the Attorney appearing for any such party.

In this case appearance was entered and a plea filed by Mr. Attorney Stockdale who represented both Defendants. He attended the trial of the case and was present when the judgment was delivered. Under the circumstances the Magistrate correctly entered a final judgment against the Defendants.

With regard to the second ground of appeal, the Court is satisfied that there is sufficient evidence on the record to justify the Magistrate's finding.

The appeal is dismissed with costs.

Note:—The case of Sidelo and Huwa *versus* Silimela is of interest. Page 83 of these Reports.

1926, May 18.

Kokstad.

LEFANA *vs.* MAMOSA.

(Mount Fletcher Case.)

Before J. M. Young, Ag. C.M., President, with W. G.
Wright and H. E. Grant as Assessors.

*Reasons for Judgment in Cross-Appeal—Rule 3, Order XXIX
of Proclamation No. 145 of 1923.*

The facts are immaterial.

JUDGMENT.

By President: The attention of the Magistrate is drawn to the fact that he has not complied with the provisions of Rule 3, Order XXIX of Proclamation No. 145 of 1923.

It is impossible for this Court to deal properly with the appeal until he has done what he ought to have done under the Rules.

The record is referred back to the Magistrate, who is requested to furnish his reasons for judgment in detail.

Costs to be costs in the cause.

1923, August 16.

Lusikisiki.

SICANDO *vs.* MANDANENDABUKA.
(Lusikisiki Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson
and E. W. Bowen as Assessors.

*Application for postponement—Good and sufficient cause must
be shown.*

The relevant facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: On behalf of the Appellant application is made for the case to be postponed to the next sitting of this Court, on the ground that owing to the Appellant's absence at the mines it was not possible to obtain the fees prescribed by Government Notice No. 1481 of 1907, with which to cover the cost of service on the Respondent, no informal notice of hearing having been arranged.

The Appellant's Attorney was called upon by the Clerk of the Court on 14th May last to deposit the necessary fees. This has not been done and it is clear from the affidavit made by the Appellant's Attorney in support of the application, that no attempt was made to comply with this request till subsequent to the 8th instant.

In these circumstances the Court is of opinion that no good and sufficient cause has been shown for granting a postponement, which is refused. The appeal is therefore struck off the roll.

1925, December 1.

Lusikisiki.

TILOTI *vs.* MADLIKIZA.

(Libode Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway
and E. W. Bowen as Assessors.

*Unnecessary postponements—Undesirable for cases to be
heard in instalments.*

The case was set down for trial on 4/3/1924 after which there were four postponements by consent. At the fifth hearing three witnesses were examined when the case was again postponed. Four further postponements followed, three of which were by consent. At the next hearing two witnesses were examined and the case was again postponed, followed by two further postponements (one by consent). Four witnesses were examined at the next hearing and the case further postponed when another witness gave evidence. There were three more hearings thereafter at one of which a witness was examined. At each postponement costs in the cause were granted.

JUDGMENT.

By President: The record discloses sufficient evidence to support the Magistrate's finding and this Court is not prepared to interfere.

In regard to the argument that in view of other evidence being available the judgment should be altered to one of absolution from the instance this Court would point out that the summons was issued for 15th January, 1924, and the case concluded on 7th July, 1925, during which period there were numerous postponements several of which appear to have been without any good cause. A number of these were granted at the instance of the Plaintiff's Attorney and as he had ample opportunity to call whatever evidence was available this Court is not prepared to grant any further indulgence.

It is highly undesirable and not in the interests of justice that cases should be heard in instalments and serious notice will be taken of any repetition of the laxity shown in this case.

The appeal is dismissed with costs.

1923, August 21.

Kokstad.

O'REILLY *vs.* NKAMBAYEDWA.

(Matatiele Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright
and H. E. Grant as Assessors.

Rights of coloured persons to appeal to Native Appeal Court.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff, now Appellant, sued the Defendant, now Respondent, for a declaration of rights in regard to a certain male child and alleged in his summons:—

- (1) That the parties hereto are natives.
- (2) That the Plaintiff was the guardian according to native law and custom of one John Anton O'Reilly, the illegitimate son of Plaintiff's sister, Johanna, the said John Anton O'Reilly being now dead.
- (3) That the said John Anton O'Reilly seduced and rendered pregnant one Esther Kotelana, the sister of the Defendant on two occasions.
- (4) That Defendant is the guardian according to native law and custom of the said Esther Kotelana.
- (5) That of the first pregnancy mentioned in paragraph (3) a male child was born which subsequently died and 3 head of cattle were paid to Defendant as fine; and of the second pregnancy a male child was also born which is now about five years of age and it was agreed between the Plaintiff and the Defendant that 2 further head of cattle should be paid as fine for the second pregnancy, and the child delivered to the Plaintiff.
- (6) That the agreed fine for the second pregnancy was duly paid and the child thereof delivered to the Plaintiff about four years ago and has remained with and has been maintained by him until some time during the early part of the year 1922 when the said Esther Kotelana by stealth and without the Plaintiff's knowledge or consent removed the said child from the Plaintiff's kraal and refuses to return him to the Plaintiff.
- (7) That the said child is still wrongfully and unlawfully withheld from the Plaintiff who has demanded his return from the Defendant.

The Defendant pleaded as follows:—

- (1) That he puts Plaintiff to proof of the allegation that he is a native and guardian of J. A. O'Reilly's child.
- (2) That assuming that Plaintiff succeeds in proving the above facts, then Defendant states that Esther and J. A. O'Reilly lived together as man and wife for many years and 4 head of cattle were paid as dowry for Esther, and the child in question was the result; that full dowry for Esther was not paid; that J. A. O'Reilly's people are not entitled according to Native Custom to the child or to possession of the child while only 4 head of dowry are paid.

- (3) That assuming that Plaintiff fails to prove the allegation referred to in Paragraph 1 hereof, then Defendant is entitled to judgment.
- (4) That Defendant puts Plaintiff to proof that he is entitled to the child as set forth in Paragraphs 5, 6, 7, of summons and Defendant denies that Plaintiff is entitled to the child.
- (5) Wherefore Defendant prays for judgment with costs.

The Magistrate absolved the Defendant from the instance with costs and the Plaintiff has appealed on the grounds--

- (1) that the evidence discloses that the Appellant is a native according to law;
- (2) that the agreement alleged in the summons has been sufficiently proved and the probabilities are with the Plaintiff.

In his reasons for judgment the Magistrate states that he was not satisfied that the Plaintiff was a native nor was he satisfied that the Defendant agreed to the contract with a full knowledge of the rights of the parties.

It appears that the Plaintiff is the son, presumably legitimate, of a white man and a native woman, and that the late J. A. O'Reilly, father by Esther Kotelana of the child in question, was the illegitimate son of Plaintiff's sister Johanna by a white man whose name is not disclosed.

On behalf of the Respondent it is contended that Plaintiff is not a native and it is therefore not competent for this Court to hear the appeal. For the Appellant it is argued that he is and has been for many years the holder of an allotment of land and that the provisions of Sections 1 and 12 of Proclamation No. 142 of 1910 entitle him to come to this Court. It, however, seems clear that the child in question cannot be held to be "such property" as is contemplated by Section 12 of the Proclamation. The preamble to Proclamation No. 391 of 1894 provides that an appeal shall lie to this Court in any civil suit, action or proceeding in which natives alone are the parties. It appears to be clear from the record that the Plaintiff has not abandoned European habits and modes of life, and the Magistrate before whom he appeared was satisfied that he is not a native. In the case of *Mangina versus Jonas* (24 S.C. 606) the Court would have apparently held that the Respondent was not a native had it been proved that his father was a European.

This Court is of opinion that the Appellant is not a native within the meaning of Proclamation No. 391 of 1894, and that consequently he cannot appeal to this Court. The appeal will therefore be dismissed with costs.

1925, August 8.

Kokstad.

KWAYI *vs.* MDENI.
(Mount Frere Case.)

Before J. M. Young, A.C.M., President, with H. E. Grant
and F. E. G. Munscheid as Assessors.

*Practice—Native Appeal Court—Petitions to—Court can only
exercise review powers when matter brought by way of appeal.*

The facts are immaterial.

JUDGMENT.

By President: In this matter the Petitioner prays for an order of this Court declaring a judgment granted in the Court of the Magistrate of Mount Frere on the 11th day of June, 1922, against him at the suit of one Mdeni to be irregular and null and void, and setting aside the said judgment and the process issued thereunder, or to grant him such other or further relief as may seem meet.

The first question to decide is whether the Court has jurisdiction.

Reference to Proclamation No. 145 of 1923 constituting this Court shews that its functions are restricted to the hearing of appeals in civil suits between natives [Section 72 (1)] and that only at the hearing of any appeal may it exercise all the powers of the Supreme Court as a Court of Review. Section 77 lays down the procedure of the Court indicating its powers in dealing with such appeals. There is thus nothing in its constitution which enables it to grant the Petitioner the relief he seeks as the matter has not come before this Court on appeal.

This Court is not one of the first instance and the application is one which in the ordinary course would fall to be dealt with as an action under Section 36 and Order XXVIII of Proclamation No. 145 of 1923 in the Court in which the default judgment was given. Such Court alone can entertain an application of this nature. Unless and until the matter comes before the Court by way of appeal from a decision of the Magistrate's Court, it cannot be heard.

The application is refused with costs.

1926, December 7.

Kokstad.

MAMOSIA *vs.* LEFANA.
(Mount Fletcher Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright
and H. E. Grant as Assessors.

Review of taxation by judicial officer not a civil suit or proceeding within the meaning of Section 72 (5), 73 (1) and 101 (2) of Proclamation No. 145 of 1923, but falls to be determined in terms of Section 70 (1) of the Proclamation.

The facts are immaterial.

JUDGMENT.

By President: This is an application for an extension of time in which to note an appeal against the decisions of the Clerk of the Court and the Magistrate of Mount Fletcher relating to the taxation and revision by them respectively of a bill of costs.

In support of the application it is contended that Section 70 (1) of Proclamation No. 145 of 1923 is intended for Europeans only and that Sections 72 (5), 73 (1) and 101 (2) govern the matter in cases between Natives and empower this Court to hear and determine the question in issue.

In the opinion of this Court the review of taxation by a judicial officer is not a civil suit or proceeding within the meaning of the sections relied upon. Section 70 (1) explicitly provides that the decision of the judicial officer may be brought in review before a Judge of the Court of Appeal, which Court is defined as being the Provincial or Local Division of the Supreme Court to which an appeal lies from the Magistrate's Court, or the Native Appeal Court as the case may be.

There being no judges of the Native Appeal Court it appears to have been the clear intention of the legislature to restrict the review of taxation in all cases, whether European or Native, to a Judge of the Provincial or Local Division of the Supreme Court.

This Court is therefore of opinion that the review which is sought falls to be determined in the manner provided by Section 70 (1) of the Proclamation.

The application is accordingly refused with costs.

1927, April 4.

Kokstad.

MDLOZINI vs. MDLOZINI.
(Umzimkulu Case.)

Before J. M. Young, A.C.M., President, with W. G. Wright and F. N. Doran as Assessors.

Interdict—Rule nisi—Application to set aside—Discretion of Magistrate to refuse application for postponement.

JUDGMENT.

By President: The Appellant, who is a widow, and whose husband died during the month of August, 1926, applied on the 8th February, 1927 to the Magistrate of Umzimkulu and was granted a *rule nisi* calling upon the Respondent to shew cause on the 22nd February, 1927 why he should not be interdicted from disposing of, selling or dealing with certain movable and immovable property which Appellant alleged belonged to the joint estate of her deceased husband and herself and which she complained Respondent had wrongfully and unlawfully and without the consent or permission but forcibly and without colour of right possessed himself of and removed

from the kraal of her late husband. On the 9th of February 1927 the Respondent, through his attorney, gave notice that application would be made on the 15th February, 1927, for the *rule nisi* to be discharged.

On the 15th February Appellant objected to the notice anticipating the return day on the ground that no replying affidavit setting forth the grounds on which the Respondent claimed that the interim interdict should be discharged, had been filed.

This objection was overruled. The Respondent then led the evidence of Mr. H. K. Dell, Attorney and Notary Public, to shew that the marriage of Appellant and her late husband was by Antenuptial Contract and not in Community of Property as alleged by Appellant in her affidavit filed in support of her application.

After this evidence had been led Appellant's Attorney applied for a postponement to enable him to receive instructions from his client for the cross-examination of Mr. Dell. This application was refused. A further application was made for a postponement to enable Appellant to bring evidence to rebut that given by Mr. Dell. This application was also refused and an order was made discharging the *rule nisi* with costs.

An appeal is now brought on the following grounds:—

- (1) That the judgment with costs dismissing applicant's objection to respondent's application is wrong, bad and insupportable in law by reason that the said application omits to allege grounds for the discharge of the interim interdict and so prejudicing and springing a surprise on the applicant who did not know what case she had to meet.
- (2) That the presiding Magistrate failed to exercise a judicial discretion in refusing applicant's request for a postponement enabling her attorney to get her instructions for cross-examination of the witness Dell whereby applicant was further prejudiced.
- (3) That the judgment discharging the interim interdict with costs is wrong, bad and insupportable in law inasmuch as the only point put in issue by Respondent was the question of ownership which was actually irrelevant and the question of possession and spoliation was not denied by Respondent or put in issue and that being so the interdict should have been made absolute with costs.
- (4) That generally the judgment is not supported by any legal evidence.

Dealing with the first ground of appeal. Although it is customary to file replying affidavits there is nothing in the Rules of Court making it compulsory for the Respondent to do so. The Court therefore is of opinion that this ground must fail.

With regard to the second ground the Court is satisfied that the Magistrate was right in refusing the application. No

good purpose would have been served by a postponement. The antenuptial contract having been proved and filed of record was evidence that it had been entered into until such time as it was set aside by a competent court on the grounds of misrepresentation, forgery or fraud. This could not have been done by the Court at the hearing of the application.

Coming to the third and fourth grounds of appeal the application was for an interdict restraining the Respondent from dealing with certain property half of which applicant claimed as hers by virtue of a marriage in community of property. It was not an application for a *Mandament Van Spolie*.

For these reasons the court is of opinion that no good cause has been shown for disturbing the Magistrate's order discharging the interdict with costs and the appeal is accordingly dismissed with costs.

1923, November 8.

Umtata.

MONI *vs.* MSONGELWA.

(Engcobo Case.)

Before J. M. Young, A.C.M., President, with E. G. Lonsdale and F. N. Doran as Assessors.

Custom—Seed bearers—Unusual to replace deceased wife in house to which there is an heir.

Plaintiff alleged that his father had three houses.

- (1) Great House to which he was heir.
- (2) Right Hand House of which Defendant is heir.
- (3) Qadi House in which two girls were born whose dowry was now in question.

Defendant pleaded that his father married three wives.

- (1) Nowanti—Great House and mother of Plaintiff, and who is still alive.
- (2) Nolenti—Right Hand House—mother of Defendant, who is dead.
- (3) Nowayiti—mother of the girls in question placed in the Right Hand House to bear seed for that house—and that she was never a Qadi to Great House.

It was agreed between the parties that the Court should give a ruling on the point as to whether it is possible to revive a Right Hand House when an heir to the house has already been born. Judgment was entered for Plaintiff.

JUDGMENT.

By President: The case having been submitted to the Native Assessors they state that it is most unusual for a wife to be married into a house where there is already an heir and when this is done the woman married to replace the dead wife is generally taken from the family of the deceased wife. This statement of custom is in accord with previous decisions of this Court. The appeal is dismissed with costs.

1924, August 12.

Lusikisiki.

MAKOBA *vs.* MNTOPAYO.

(Flagstaff Case.)

Before W. J. Davidson, Magistrate Lusikisiki, President,
with W. T. Hargreaves and E. W. Bowen as Assessors.

*Pondo Custom—Commoner may not nominate heir—Seed
bearers.*

The facts are sufficiently clear from the judgment of the
Native Appeal Court.

JUDGMENT.

By President: In this case Plaintiff (now Appellant)
applied—

- (a) for an order declaring him to be the heir of the late Mtandeli's First House and as such entitled to the inheritance of that House;
- (b) for a statement or account of the late Mtandeli's said First House together with the increase thereof; and
- (c) for delivery of such property as shall be disclosed in such statement or payment of the value thereof, for alternative relief and costs of suit.

His declaration stated that he was the eldest son and heir of the late Mtandeli's Second House and Defendant (now Respondent) eldest surviving son of Mtandeli's Third House, that Mtandeli had two sons in the First House both of whom died without male issue and therefore by custom he (Plaintiff) became heir to Mtandeli's First House, that Defendant appropriated the property of the First House and declined to recognize his rights, and that the late Mtandeli left cattle, goats and sheep but he was unable to describe them as Defendant refused him access to examine them.

Defendant pleaded personally and admitted that Plaintiff was the eldest son of Mtandeli's Second House. He denied that he appropriated the property and stated that he was acting for Makosimane son of the late Mtandeli by his sixth wife made Qadi of the First House by Mtandeli and admitted that the late Mtandeli left cattle and sheep but no goats.

Subsequently the plea was amplified by Defendant's Attorney stating that Makosimane was nominated as heir and that he (Makosimane) should have been joined in the action and that the property consisted of 10 head of cattle, 1 horse and 5 sheep.

Before any evidence was led Plaintiff's Attorney stated that the judgment in this case rested on the decision of a few points on native custom.

By consent Defendant's Attorney produced and put in a document signed by 17 persons as witnesses to a document on the subject of the late Mtandeli's nomination of Makosimane as heir to the First House. This document was declared before a Commissioner of Oaths on 16th October, 1917—fifteen

of the seventeen persons who signed the document declared that five or six years before this date (16.10.1917) Mtandeli married Mazalu stating that he wished her to raise seed, particularly an heir to the First House as all the sons in that House had died without male issue and that a son of Mazalu was to be heir to the First House, that Mazalu gave birth to a son named Makosimane who had since been regarded as heir of the First House, that on 12th October, 1917, Mtandeli who had called them together for consultation regarding his estate stated that he wished an Attorney instructed to draw up a deed of allotment, that on 15th October, 1917, messengers proceeded to Flagstaff to engage the services of an Attorney and found him absent, that the Attorney arrived at the kraal after 5 p.m. on 16th October, 1917, and that Mtandeli had died about noon on the same day.

Some evidence was led on 6th March, 1924, and the case was postponed to 12th March, 1924, for the purpose of calling evidence on Pondo custom on certain points. :—

- (1) Whether a paramount chief only may nominate his heir.
- (2) Whether a man may marry a seed-raiser to a house the wife of which, old and beyond child bearing, is still alive.

After hearing the evidence of Lumayi Langa and others on these points the Magistrate entered a judgment for Defendant with costs.

Plaintiff has now appealed on the ground that under native custom a man is not entitled to marry a seed-bearer to a wife who is still alive and has had children by him and that under Pondo custom a commoner cannot nominate his heir. Further that the Magistrate was requested by Plaintiff's Attorney only to rule upon the above points. It is contended that the Magistrate went beyond the request and in addition to a ruling on the points submitted gave judgment upon the merits for the Defendant.

The Magistrate in his reasons for judgment states he arrived at the conclusion that Mtandeli acted in accordance with custom in marrying a seed-raiser for the First House.

The points on custom were referred to the Pondo Assessors who unanimously stated the Pondo custom as follows, viz. :—

- (a) A commoner is not entitled to nominate his heir, and
- (b) A native with an heir in the Second House may not marry a seed-bearer to raise an heir to the First House.

This opinion is in agreement with previous decisions of this Court and the appeal will therefore be allowed with costs and the judgment in the Court below altered to one for Plaintiff as prayed with costs.

1924, December 13.

Lusikisiki.

MAGADULE *vs.* MDINWA.

(Bizana Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson
and W. C. H. B. Garner as Assessors.

*Seduction—No fine if unaccompanied by pregnancy—
“Bopa” fee one beast only—Custom—Eastern Pondoland.*

The facts are immaterial.

JUDGMENT.

By President: The main ground of appeal is that the Magistrate erred in finding that Mamzizi is Plaintiff's wife and it is urged that the three cattle paid were fine and not dowry.

The Magistrate found that they were dowry and the surrounding circumstances satisfied him that there had been a marriage.

The Native Assessors having been consulted state that in Eastern Pondoland there is no fine for seduction unaccompanied by pregnancy and that when a “bopa” fee is paid it consists of one beast only. It is therefore extremely improbable that the three cattle were paid as fine. In the opinion of this Court there is ample evidence to support the Magistrate's finding which is consistent with custom. The appeal is dismissed with costs.

1927, August 9.

Lusikisiki.

NDLEKENDLEKE AND NDLELAMBINI *vs.*

SWELINDAWO.

(Tabankulu Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway
and F. C. Pinkerton as Assessors.

Elopement—Seduction—No fine if unaccompanied by pregnancy—Pondo Custom.

Swelindawo sued Ndlekendleke, an unmarried man living at Ndlelambini's kraal for three head of cattle or £15 as damages for the seduction of his sister Nomavuso who eloped with Ndlekendleke and was taken by him to live at his father's kraal where she remained for about a week before being fetched away. The seduction was not accompanied by pregnancy. The Magistrate found for Swelindawo. Ndlekendleke appealed.

JUDGMENT.

By President: The Native Assessors having been consulted state that in Eastern Pondoland when elopement and seduction are not followed by pregnancy and the girl returns to her father no fine is recoverable from the seducer. This expression of opinion is consistent with that given in the case of Magadule Nobedina *versus* Mdindwa heard by this Court in December, 1924. (*Supra*.)

The appeal will be allowed with costs and the judgment in the Court below altered to one for the Defendant with costs.



1925, November 5.

Umtata.

MTYANA AND MONI *vs.* NTIKA.

(St. Marks Case.)

Before J.M. Young, A.C.M., President, with R. H. Wilson
and G. M. B. Whitfield as Assessors.

*"Taking Action"—What amounts to in Native law—
Assessors opinion not followed.*

Defendant seduced and rendered pregnant Plaintiff's daughter. Plaintiff sent messengers to report the pregnancy to Defendant and to demand damages. Thereafter he gave his daughter in marriage to another man. Plaintiff sued Defendant for damages for seduction and pregnancy of his daughter.

Defendant excepted to the claim on the ground that Plaintiff's actions did not amount to "taking action" in Native law. The exception was overruled and the excipient appealed.

JUDGMENT.

By President: The question whether the Respondent's action in sending messengers to Defendant to report his daughter's condition and demanding damages amounted in Native law to "taking action" is put to the Native Assessors at the request of the Appellant's Attorney and they state that if the Defendant admitted the claim Plaintiff is entitled to sue for damages but if he denied the seduction Plaintiff cannot now sue. He should have sued Defendant before giving his daughter away in marriage. This statement is not consistent with previous decisions of this Court which has frequently held that the reporting of the pregnancy coupled with a claim for damages amounts to "taking action" in Native law. The Court is not prepared to depart from these decisions.

The appeal is dismissed with costs.

1926, May 17.

Kokstad.

STEENKAMP *vs.* JANTJES AND PIENAAR.

(Mount Currie Case.)

Before J. M. Young, Ag. C.M., President, with H. E. Grant
and F. N. Doran as Assessors.

*Seduction—General damages—Father of girl seduced cannot
sue for, under Common Law.*

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Appellant (Plaintiff in the Court below) sued the Respondent for the sum of £250 damages alleging—

- (1) that Plaintiff is a contractor carrying on business as such and residing at and in the town of Kokstad, and is the father and natural guardian of the minor Martha;
- (2) that first defendant is a saddler and harness maker residing in 5th Street in Kokstad aforesaid. The

- second Defendant is a spinster residing at her house in Hathorn Street, also in Kokstad aforesaid;
- (3) between the 1st day of August, 1925, and the 15th day of October, 1925, both Defendants, acting together and in concert, wrongfully, unlawfully and wilfully supplied, applied, gave and administered drugs, charms and other matters or things to the said Martha, with intent to stupefy and overpower her so as thereby to enable the first Defendant to have unlawful carnal knowledge with the said Martha, she being under the age of 21 years and not being a common prostitute or of known immoral character, but, in fact, being a virgin;
 - (4) that on the afternoon of the 10th day of October, 1925, and in the house aforesaid of the second Defendant, whilst the said Martha was in a state of stupefaction or overpowered as a consequence of the drugs, charms and other matters or things referred to in the preceding paragraph was debauched, carnally known and seduced by the first Defendant;
 - (5) that on the afternoon of the 15th day of October, 1925, and in the house aforesaid of the second Defendant, and with the connivance of the first Defendant the second Defendant made and performed certain cuts and abrasions upon and about the body of the said Martha and to the wounds caused and produced by such cuts and abrasions, the second Defendant placed certain drugs, charms, matters or things with the object of further stupefying and overpowering the said Martha;
 - (6) the acts referred to in paragraphs 3 and 5 constituted an assault, aggression and insult upon the Plaintiff's daughter, the said Martha;
 - (7) the acts referred to paragraph 4 constituted the seduction of Plaintiff's daughter, the said Martha;
 - (8) that by reason of the foregoing, Plaintiff has suffered and sustained injury and damages in the sum of £250, for which both Defendants are jointly and severally liable, the one paying the other to be absolved;
 - (9) that despite demand for payment of the said sum of £250 Defendants neglect and refuse to pay.

On the application of Defendants, the following particulars were furnished:—

- (1) No special damages are claimed.
- (2) Martha was born on the 18th July, 1905.
- (3) The action is brought under the Common Law of South Africa.

Both Defendants then excepted to the summons on the ground that it disclosed no cause of action for the reason that Plaintiff in law has no personal right to recover any damages under the circumstances set forth in the summons and further particulars supplied.

The Magistrate upheld the exceptions and dismissed the summons with costs.

Against this finding an appeal is brought on the ground that the Magistrate erred in accepting the authorities quoted by the excipients as being a correct statement of the law on the subject.

In the opinion of this Court the Magistrate correctly interpreted the law and rightly upheld the exceptions.

The Plaintiff's action is one for general damages and is brought in his own name and not on behalf of his minor daughter Martha.

It would seem from the decision in the case of *Webb versus Langai* (4 E.D.C. 68) that the proper person to sue in an action for seduction is the injured girl herself, assisted, if she be a minor, by her father or guardian, and that only where the action is for lying-in-expenses can the father sue, if he has defrayed them or made himself liable therefor.

With regard to the claim for damages for assault, aggression or insult, the Plaintiff would appear to have no action for general damages; he would only be entitled to recover the medical and other expenses necessitated by the injury and compensation for loss of services, if any.

The appeal is dismissed with costs.

1926, May 17.

Kokstad.

DAMANE *vs.* SEKELENI.

(Mount Currie Case.)

Before J. M. Young, Ag. C.M., President, with H. E. Grant and F. N. Doran as Assessors.

Seduction—Action under Common Law by woman seduced.

Plaintiff sued for £200 damages for seduction and breach of promise of marriage under the Common Law, and obtained judgment for £50 damages. Defendant (Appellant) contended that as the parties to the suit were natives the action should have been tried under Native Law.

JUDGMENT.

By President: The only point pressed on appeal by the Appellant's attorney is the question whether, under the circumstances disclosed in this case, a native woman has the right, under the Common Law, to maintain an action for damages for seduction and breach of promise of marriage.

It has been held repeatedly by this Court that a native woman who has been seduced is herself entitled to recover damages as for an injury to herself personally.

Since the promulgation of Proclamation No. 145 of 1923, the basis of the application of native custom has been altered. It is now entirely restricted to questions of native law.

In this case the action is brought under Common Law and the Magistrate had no option but to apply it.

The appeal is dismissed with costs.

1924, December 9.

Kokstad.

QANTSIYANA *vs.* MASIU.
(Mount Fletcher Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright
and H. E. Grant as Assessors.

*Slander—Privilege—Onus on Plaintiff to prove affirmatively
animus injuriandi.*

The essential facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Magistrate found that the words complained of were used on a privileged occasion and with that finding this Court concurs. For the Plaintiff to succeed it thus became necessary for him to prove that Defendant was prompted by express malice; this the Magistrate finds was the case, holding that the Defendant had been actuated by express malice in recklessly preferring a charge of theft against the Plaintiff. This finding is based on two grounds, viz. :—

- (a) That Defendant entertained hostile feelings against the Plaintiff as instanced by the fact that he was one of a faction who wished to have Plaintiff deposed from his headmanship.
- (b) That having failed to establish the truth of his allegations against the Plaintiff the Defendant had done him a wrong and was accordingly liable for the resulting injury. In regard to this aspect the Magistrate, relying on Nathan's Common Law of South Africa (1st Edition, Volume III, p. 1600), says "In an action for defamation the falsehood of the statements injurious to the character of the Plaintiff, which have been published by the Defendant, is sufficient to prove such an *animus injuriandi* as is required to render the Defendant liable."

In regard to the first ground this Court is of opinion that the Defendant in having formed one of a deputation of ten persons who petitioned their chief, Moeketsie Lebenya, to take steps to have the Plaintiff removed from his headmanship, which petition was presented some months after the alleged defamatory words were uttered, is not sufficient evidence that the Defendant was at the time actuated by express malice. As regards the second ground the Appellate Court in the course of its judgment in the case of McLean *versus* Murray (1923, A.D. 414), said :—

"The true rule was laid down in this Court in the case of Monckton *versus* British South African Co. (1920. (A.D. 331), where the Chief Justice in his judgment says: 'The communication having been published on a privileged occasion, the ordinary presumption as to *animus injuriandi* is rebutted, and the existence of such *animus* must be affirmatively established by the Plaintiff.

This he can do by proving that the Defendant published the communication not in good faith but *mala fide*, thus exceeding the limit of his privilege and indicating that he was actuated by that *animus injuriandi* which is an essential element in actions for verbal or literal injury.' Substantially the same rule was laid down by the Privy Council in the case of *Jenoure versus Delmege* (1891, A.C. 79), where Lord Macnaghten in delivering judgment of the Court adopted the language of Cotton, L.J., in *Clark versus Molyneux* as a correct statement of the law in regard to communications published on a privileged occasion. This is what Cotton, L.J., said: 'The burden of proof lay upon the Plaintiff to show that the Defendant was actuated by malice; but the learned judge told the jury that the Defendant might defend himself by the fact that these communications were privileged, but the Defendant must satisfy the jury that what he did he did *bona fide* and in the honest belief that he was making statements which were true. It is clear that it was not for the Defendant to prove that he was acting from a sense of duty, but for the Plaintiff to satisfy the jury that the Defendant was acting from some other motive than a sense of duty.' "

After a careful perusal of the evidence and the Magistrate's reasons for his judgment this Court can find no grounds for arriving at the conclusion that the Defendant had acted *mala fide* in making the statement he did during the course of an inquiry by the police who were investigating a charge of theft of stock. In the opinion of this Court express malice has not been established and the appeal must accordingly be allowed with costs and judgment in the Court below altered to one for the Defendant with costs.

1926, November 18.

Umtata.

NOBULAWA *vs.* JOYI.

(Tsolo Case.)

Before J. M. Young, A.C.M., President, with G. M. B. Whitfield and H. E. F. White as Assessors.

Rights of spinster of full age—Property earned by her—Native custom repugnant to justice and equity.

Plaintiff, a spinster of full age, sued Defendant, her brother, for a declaration of rights as to nineteen head of cattle and costs of suit. Plaintiff prior to East Coast fever, purchased a beast from her own earnings and left it at her brother's kraal. This beast has now increased to nineteen head. Defendant refuses Plaintiff control over these cattle and as her guardian and head of his late father's kraal, claims them as his property.

JUDGMENT.

By President: In the case of *Nolanti versus Sintenteni* (1 N.A.C. 43), where the claim was one by a widow for property earned by her subsequent to the death of her husband, the President in delivering judgment stated *inter alia*:—

“ By Section 38 of Proclamation No. 140 of 1885 the age of legal majority of both males and females is 21 years. It therefore follows that after the death of her husband the Appellant *Nolanti* became free of all control and is entitled to retain in her own right all property she may have acquired since her husband's death.

The Court is aware that this is in conflict with Native Custom but where Native Custom is repugnant to justice and equity and to special provisions in the Proclamations for the government of the Native Territories it must give way.”

In the present case the Appellant is a spinster of full age and it is not disputed that the property claimed was earned by her. The provisions of Section 39 of Proclamation No. 112 of 1879 are identical with those of Section 38 of Proclamation No. 140 of 1885.

Applying the principle which was laid down in the case above quoted, and which has been followed in numerous other cases, this Court is of opinion that the Appellant should succeed.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Plaintiff as prayed with costs.

1925, August 7.

Kokstad.

GCWABE *vs.* MAFUYA.

(Matatiele Case.)

Before J. M. Young, A.C.M., President, with H. E. Grant and F. E. G. Munscheid as Assessors.

Spoilation—What is possession.

The facts are clear from the following judgment.

JUDGMENT.

By President: The Respondent, Applicant in the Magistrate's Court, obtained a *rule nisi* against the Appellant, Respondent in the Magistrate's Court, ordering him to restore to and put the Respondent in possession of certain four head of cattle alleged to have been spoliated from the lawful possession of Respondent by Appellant, and calling upon him to show cause on the 20th February, 1925, why such order should not be made final with costs.

On the 6th March, 1925, after hearing evidence, the Magistrate made the following order:—“ The Court orders that the cattle in question be returned forthwith to the kraal of the late John Gewabe. Defendant to pay costs.”



Against this order an appeal has been brought on the following grounds:—

- “(1) That the Court granted an order which did not make final the *rule nisi* (against which Respondent was called upon to show cause) or discharge such rule as should have been done in the circumstances, but on the contrary made an order to which Applicant was not entitled.
- (2) That applicant failed to prove the very first essential entitling him to the confirmation of the *rule nisi* namely, actual possession by him of the cattle.
- (3) That the judgment is against the weight of evidence and not in accordance with the legal principles deducible therefrom.”

It has been argued on behalf of the Appellant that the Respondent has failed to prove that when the animals were removed from the kraal of the late John Gewabe they were in his possession and that his having failed to prove possession the *rule nisi* should have been discharged.

It is quite clear from the record that the cattle were taken by Appellant from the kraal of the late John Gewabe, where they were running, and that Respondent has his own kraal, Respondent's contention is that after John Gewabe's death he was placed in charge of this stock and that having been so placed in charge no one had the right to take it without his permission.

The only question for decision is: Was Respondent in possession of the stock when it was removed by Appellant?

There is evidence to show that Respondent was placed in possession of the cattle. He sold one of the animals, the herd is paid by him, he pays the dipping fees and the stock grazed with his own. Jeremiah Gewabe states that if he wished to borrow any of the animals he would go to the Respondent. All these facts go to show that although the stock was not kept at Respondent's kraal he had control of it.

In the opinion of this Court, although the order made by the Magistrate does not literally confirm the *rule nisi*, it has the same effect because it orders the Appellant to restore the cattle to the possession of Respondent at the kraal from which they were removed.

The appeal is dismissed with costs.

1926, December 7.

Kokstad.

NCELEKAZI *vs.* GQOBI.

(Mount Frere Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and H. E. Grant as Assessors.

Procedure—Spoliatory action by means of summons.

Plaintiff, now Respondent, instituted an action against Defendant, now Appellant, by way of summons for certain stock which were alleged to have been wrongfully spoliated.

Defendant denied spoliation and pleaded that the stock were handed over to him by the Plaintiff, but in the course of trial Defendant proceeded to lead evidence of ownership of the stock in question.

Plaintiff objected to such evidence being led and the objection was sustained by the Magistrate.

Defendant appealed on the ground that, as the action was by way of summons and not a *mandament van Spolie*, the question of ownership was relevant and he was entitled to lead evidence.

JUDGMENT.

By President: In the opinion of this Court the Magistrate correctly upheld the objection to the evidence tendered to prove ownership which had neither been alleged nor pleaded.

Although the proceedings were instituted by means of a summons it was an ordinary spoliatory action in which neither damages nor the value of the cattle was claimed. That proceedings of this nature can proceed by summons was decided in the case of *Sitterding versus Hermon Piquetberg Lime Co., Ltd.* (1921, C.P.D. 439).

The appeal is dismissed with costs.

1926, April 14.

Lusikisiki.

SITETO AND MALEPULA *vs.* MRETSHI.

(Bizana Case.)

Before O. M. Blakeway, Magistrate, Lusikisiki, President, with W. C. H. B. Garner and R. C. E. Klette as Assessors.

Custom—Pondo—Succession—Nomination of Great Wife—Placing of son and his wife in a hut to raise seed for the father—Illegitimate son brought to the kraal is heir in absence of legitimate male issue.

The essential facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Parties are Pondos. Mretshi is eldest son of Siteto by his first wife. Malepula is eldest son of Siteto by his second wife. Siteto is illegitimate son of Zulu, who had no male legitimate issue surviving him.

The Magistrate found the following facts proved:—

- (a) That the late Zulu had no paramount rank.
- (b) That he had no male heir in his kraal.
- (c) That he instituted Defendant—his illegitimate son—as his heir, carrying out all the necessary formalities.
- (d) That there is no vestige of evidence on which the impotency of the late Zulu can be assumed (he had seven wives and was the father of many children).
- (e) That Defendant's eldest son Mretshi—by his first wife Mabala—is heir of the late Zulu.



The reasons for appeal noted are :—

The evidence of record discloses the fact that at the time the Defendant Siteto married the Plaintiff's mother Mabala, a marriage had already been arranged by the late Zulu, with the concurrence of Siteto, between the said Siteto and Magqwaru (mother of second Defendant) and an engagement beast paid in respect of such marriage. That such marriage was arranged with a view to raising an heir for Zulu, that on the marriage of the said Magqwaru she was placed in Zulu's Great Hut and occupied the position and undertook the responsibilities of his Great Wife, and that the Defendant Malepula on his birth was accepted and declared as heir of the said Zulu with the knowledge and acquiescence of the said Siteto and all members of the tribe.

It is contended that the issue of such marriage would be entitled to succeed to the estate of the late Zulu and that the said Zulu had the power to make the above arrangement as by so doing he was not prejudicing the interests of any inmate of his First Hut or any other hut. In so far as any possible interests of the illegitimate son Siteto were affected he was an active and consenting party.

When the late Zulu took Siteto as a young boy to his kraal he did not do so with the object of appointing him as his heir as at that time Zulu had not abandoned hopes of having a legitimate heir. There is no evidence on record that Zulu thereafter established and declared Siteto to be his heir whereas ample evidence has been adduced to prove that he refused to accept him as his heir.

Further, any claim the said Siteto may have had to Zulu's estate, as an illegitimate son thereof, he took no steps to establish but voluntarily abandoned.

In the course of argument before this Court the Appellant's attorney contended that the evidence given by Defendant and his witnesses had not been contradicted and should be accepted, especially in regard to the marriage of Siteto with Magqwaru and the placing of the said Magqwaru in the hut of Zulu's Great Wife, and also drew attention to the fact that Siteto had not at any time been declared or recognized as the heir of Zulu.

For the Respondent it was urged that Siteto had on previous occasions declared that he was the heir to Zulu and reference was made to the documents forming part of the record disclosing this fact.

The Native Assessors state—

- (1) that a man has not the right to nominate a second or subsequent wife as the Great Wife for himself or his son. A Paramount Chief only can nominate his own Great Wife;
- (2) there is no custom which provides for a man placing his son and wife in a hut to raise seed for him (the father);
- (3) that an illegitimate son brought to the kraal would, in the absence of legitimate male issue, be the heir.

This Court agrees with the decision arrived at by the Magistrate.

The appeal is dismissed with costs.

1926, August 12.

Lusikisiki.

KAPARI *vs.* POSSA.
(Tabankulu Case.)

Before J. M. Young, Ag. C.M., President, with O. M. Blake-way and E. W. Bowen as Assessors.

Succession—Property not allotted to any of minor houses belongs to Great House—Diversion of property from one house to another—Disinherison.

The relative facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Appellant in this case, who is the eldest son and heir in the Great House of the late Robert Poswa, sued the Respondent, who is the widow of the Right Hand House, in an action in which he claimed—

- (1) a declaration of rights to movable and immovable property in the estate of the late Robert Poswa;
- (2) a declaration that he is the guardian of the Respondent and her seven minor children;
- (3) an order barring Respondent from disposing of any cattle belonging to the estate;
- (4) an order directing Respondent to give an account of moneys received by her as rent for certain immovable property situate in the village of Tabankulu;
- (5) an account of all moneys received by her for stock sold without Appellant's consent;
- (6) alternative relief.

In his particulars of claim Appellant alleged that:—

- (1) That he is the eldest son and heir of the Great House of his late father Robert Poswa;
- (2) That Defendant is the wife of his father of the second house;
- (3) That Defendant, after the death of his, Plaintiff's, father, took to herself all the property belonging to the said estate, and has disposed of 12 head of cattle and 17 small stock without first consulting him—Plaintiff;
- (4) That Defendant has wrongfully received rent paid for the property situate in Tabankulu village and used same for her own benefit;
- (5) That according to Native Custom Plaintiff being the heir of his father, is guardian of Defendant, together with her minor children, which Defendant refuses to recognise.

The Respondent pleaded as follows:—

- (1) Admits paragraph (1) of Plaintiff's summons;
- (2) Denies paragraphs (3) and (4) of Plaintiff's summons, and puts Plaintiff to proof thereof;
- (3) Admits that Plaintiff is her guardian according to Native Law and Custom, but denies that she refuses to recognise him, and pleads:—
 1. That with reference to paragraph 2 of summons, Defendant is the widow of the late Robert Poswa of the Right Hand House, in which house there is a son and heir, Mgwena;
 2. That all property left by the late Robert Poswa at his death in the possession of Defendant at his Right Hand House was the property of the Right Hand House, and that Defendant's son, Mgwena, is heir thereto and not Plaintiff.
 3. That Plaintiff, by his actions and attitude towards Defendant, is making her life at the Right Hand House, her own kraal, intolerable.

From the evidence recorded it would appear that the late Robert Poswa married Appellant's mother by Native Custom many years ago, that he lived with her in the village of Tabankulu, where he was employed as a constable, and that about 1904 he took Respondent as his second wife. About this time the first wife left for Basutoland, and never returned to the Tabankulu district. This Court is satisfied, however, that her marriage with the late Robert Poswa was never dissolved, and that the Great House was never abandoned.

In 1909 the late Robert Poswa officially acquired a kraal site in Tsita's or Ndlebe's Location, and about 1912 the Respondent took up her residence at this kraal, and has continued to live there.

At the time of Robert Poswa's death he was possessed of considerable property. Respondent contends that all the property belongs to the Right Hand House, whilst Appellant maintains that all the property, with the exception of stock paid as dowry for the daughters of the Right Hand House, belongs to the Great House, and that nothing was apportioned or allotted to the Right Hand House.

In the case of *Fanekiso versus Sikade*,* heard at the Appeal Court at Umtata in November, 1925, after consultation with the Native Assessors, and following previous decisions of this Court, it was held to be indisputable Native Custom that property not allotted to any of his houses, belongs to a deceased's Great House, and that it is not competent for a native to divert property from one of his houses to another, or disinherit his heir without showing cause at a public meeting of relatives.

The relatives of the late Robert Poswa enumerate and describe certain property as belonging to the Great House, some of which, they state, is actually in their possession, but

* See page 178 of these Reports.

it is not possible for this Court, on the evidence before it, to ascertain with any degree of certainty (1) the number and class of stock in possession of the late Robert Poswa at the time of his marriage with the Respondent, (2) the increase from such stock, (3) what stock was acquired by the Right Hand House after its establishment, and from what sources, (4) when the immovable property situate in the village of Tabankulu was purchased.

The record is returned to the Magistrate, who is directed to take evidence and record his findings on these points. Costs to abide the issue.

1927, December 5.

Lusikisiki.

VUTA *vs.* NTILA.
(Port St. John's Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and W. C. H. B. Garner as Assessors.

Ukungena—Pondo custom—Inheritance—Son of minor house not ousted by subsequent birth of a son to the widow of the Great House by an ukungena union.

Plaintiff (Ntila) sued Defendant (Vuta) for a declaration of rights as heir to the estate of the late Mngqanjana. Plaintiff is the only living son of his late father Mngqanjana in a minor house. Defendant is the son of the widow of the Great House of Mngqanjana by an "ngena" union. The Magistrate entered judgment declaring Plaintiff to be the heir to the estate. The Defendant appealed.

JUDGMENT.

By President: The Native Assessors having been consulted state that according to Pondo custom when a man dies leaving a son in a minor house the subsequent birth of a son to the widow of the Great House by an "ngena" union does not oust the former who would continue to be the heir of the deceased.

This expression of opinion is consistent with the decision of this Court in the case of Manyosini *versus* Nonkanyezi (1 N.A.C. 114).

The appeal accordingly fails and is dismissed with costs.

1927, March 2.

Umtata.

MPONYA, ASSISTED BY NOGESI *vs.* MLUNGU.
(Mqanduli Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and E. G. Lonsdale as Assessors.

Illegitimate sons—Succession and status—Rights of inheritance.

JUDGMENT.

By President: The Plaintiff, now Appellant, is the son of the late Gwadiso, who was the illegitimate son of the late Bobotyana by a girl Lahlwiwe, and the Defendant, now

Respondent, is the son of Nohafu, the widow in the Right Hand House of the said Bobotyana, born at the kraal of his married sister Nohokisi many years after his death.

The Plaintiff claims from the Defendant a declaration of rights to certain girls and dowries in the estate of the late Ndabeni, the son and heir in the Great House of the late Bobotyana.

A fine was paid for the seduction of Gwadiso's mother and he remained at her people's kraal until after his circumcision, when he went to live with Ndabeni, who paid dowry for two of his wives and to whose estate he subsequently succeeded.

Recently the Defendant has received dowry for one of the daughters of the late Ndabeni, which the Plaintiff claims as being his inheritance. In the Magistrate's Court judgment was given in favour of the Defendant and against this the Plaintiff has appealed.

The Native Assessors having been consulted state that the Defendant, being the child of the widow in the Right Hand House of the late Bobotyana, born a considerable time after his death at a kraal other than his, can have no claim on the estate. On the other hand they state that Bobotyana having paid damages for the seduction of Gwadiso's mother and the fact that Gwadiso was adopted by Ndabeni into his family, his son, the Plaintiff, is heir to the estate.

The appeal will accordingly be allowed with costs and the judgment in the Court below altered in convention to one for the Plaintiff as prayed and in reconvention for the Defendant in reconvention with costs.

1927, August 15.

Kokstad.

NOMTINTEKA ASSISTED BY SAZIWE *vs.* MAKONZA.

(Matatiele Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and E. W. Bowen as Assessors.

Inheritance—Ngena—“Picked-up son during subsistence of ngena union, not entitled to succeed to mother's husband's estate—Widow's rights.

Nomtinteka Mlobeli (Plaintiff) is the widow of the late Mendela Sipika, by whom she had no issue. After Mendela's death she was “ngenaed” by Makonza, his eldest brother, and went to live with him at his own kraal. After living with him for some time she left his kraal and established her own without his consent, taking with her seven head of cattle which strayed back to Makonza's kraal and were retained by him. Saziwe is the eldest son of Nomtinteka born during her prolonged absence from her “ngena” husband. Plaintiff claimed from Makonza the return of the seven head of cattle

alleging that they had been wrongfully removed by him from her possession and for an account of the property of the estate of her late husband.

The Magistrate gave judgment for Makonza, holding that as Mendela had no male issue the former as his eldest brother is heir to the estate. Nomtinteka appealed.

JUDGMENT

By President: The circumstances having been placed fully before the Native Assessors, Mapolisa Lupindo and Lekhoasa Setloboko, state that Saziwe is heir to the estate of the late Mendela, while James Laqa, Jackson Makaula and Richard Duzo state he is not.

This Court is satisfied that Saziwe is not the issue of the "ngena" union, but was born to a stranger during the time of Nomtinteka's prolonged absence with her people and agrees with the majority opinion of the Native Assessors that he is not heir to the estate of the late Mendela and can thus not oust the Defendant who has hitherto been regarded as such heir.

In regard to Nomtinteka's claim it is clear, in the opinion of this Court, that she cannot succeed. The property belongs to the Defendant who is entitled to keep it at his kraal.

The appeal will be dismissed with costs.

1927, November 11.

Umtata.

DUMALITSHONA vs. MRAJI.

(Mqanduli Case.)

Before W. T. Welsh, C.M., President, with G. M. B. Whitfield and R. C. E. Klette as Assessors.

Inheritance—Tembu Custom—Illegitimate son born to the widow of a Great House by a stranger after the death of her husband entitled, in default of legitimate issue to inherit the estate of his mother's house even if there be legitimate male issue of the said late husband in his other houses.

JUDGMENT.

By President: In this case Plaintiff, now Respondent, sued the Defendant, now Appellant, in an action wherein he claimed to be declared the heir to the Great House of the late Mcunukelwa and entitled to the property appertaining thereto.

It is common cause that the Defendant is the eldest son and heir to the Right Hand House of the late Mcunukelwa, who left no son of his marriage in his Great House, that after Mcunukelwa's death his widow of the latter house continued to reside at that kraal where she gave birth to the Plaintiff by a stranger and that Plaintiff and his mother have continued to reside and are still resident at the Great Kraal of the late Mcunukelwa.

Ref. to in
1937 (T.N.) 40, 93
1945
(T.N.) 61

The Magistrate decided in favour of the Plaintiff and against this finding the Defendant has appealed on the sole ground that the judgment is contrary to Tembu law and custom, which provide that no child born under the circumstances disclosed with regard to the Plaintiff can inherit the estate of his mother's late husband if there be legitimate male issue of the said late husband.

Before this Court it is further contended on behalf of the Appellant that the Plaintiff is an illegitimate child and is, therefore, not entitled to inherit the late Mcunukelwa's estate in his Great House, which in the absence of male issue therein devolves upon the Defendant, the eldest son and heir in the Right Hand House.

The Native Assessors having been consulted unanimously state that according to Tembu custom when a man dies leaving a widow whom he had married by Native Custom and she continues to reside at his kraal and has a son there, such son is not illegitimate and is entitled to inherit the estate appertaining to his mother's house where there is no son of the marriage in that house.

In view of this expression of opinion, the correctness of which is not questioned, the Appellant's only ground of appeal fails, but, as this Court is not unanimous in its conclusions, it is advisable to state somewhat more fully the main grounds upon which the majority judgment is based.

In the opinion of this Court the statement of the Native Assessors is consistent with basic principles of Native Law and Custom which have long been recognized and followed by this Court and though it may be contended that these principles do not reach the ethical standards which more civilized peoples have attained, this Court, which was established in order to preserve and give judicial recognition and effect to Native Law and Custom, feels that it would not be justified in reversing, in the name of good morals, policy, justice or equity, a long and weighty line of precedents unless it were satisfied that the custom under consideration falls unequivocally within that category.

To jettison Native Law and Custom in the circumstances disclosed would necessarily involve consequential issues such as the status of widows, their dowries, guardianship of their daughters and claims to the latter's dowries with effects on the social life of the people entirely out of keeping with their habits, customs and desires.

Prior to 1924 the Courts in these Territories had power to apply Native Law to all suits between Natives, but section 104 (1) of the Magistrate's Courts Proclamation of 1923 limited the application of Native Law to suits between Natives involving questions of customs followed by Natives. Within this limitation, however, the Courts have a wide discretion and where customs and practices which are entirely in keeping with the standards of life and meet the wishes and requirements of a people, the great majority of whom are at a primitive stage of their development, and where in addition

the custom is probably less objectionable than several others which have received statutory or judicial approval this Court is of opinion that it would not be justified and would indeed be usurping the functions of the legislature if it were to intervene and to hold that the Plaintiff is not entitled to succeed.

Until the proper authorities are satisfied that the time has arrived when various widely recognized customs which are practised daily by the Native tribes of these Territories, e.g. polygamy, ukutwala, ukungena, etc., which admittedly fall short of civilised standards, should be abrogated, this Court is of opinion that it should not interfere in matters of broad policy which is the prerogative of the executive and that it would, therefore, not be justified in setting aside a custom which has long since become crystallized into law.

The appeal will be dismissed with costs.

*Dissenting Judgment by G. M. B. Whitfield, Esq.,
Magistrate, Xalanga.*

The facts in this case are common cause and are:—

- (1) That Respondent is the illegitimate son of the widow of the late Mcunukelwa in his Great House and was born at the kraal of the said Mcunukelwa after his death and having been procreated by some person whose name has not been disclosed.
- (2) That Appellant is the eldest son and heir of the late Mcunukelwa in his Right Hand House.
- (3) That in consequence of the admitted illegitimacy of the said Respondent, Appellant has refused to permit Respondent to deal with or dispose of the property in the said Great House, claiming to be the lawful heir of the said Mcunukelwa therein.

This Court has held in this case, following its previous decisions, that Respondent is heir to the Great House of the late Mcunukelwa in default of legitimate male issue in that house. This judgment has the effect of depriving Appellant of the estate of the late Mcunukelwa in his Great House, which estate had vested in Appellant upon the death of his father.

With the greatest deference and respect for the learned President of this Court and his revered and distinguished predecessors therein, I feel constrained and in duty bound, but with the utmost diffidence, to express my dissension against the continued recognition of a Native Custom opposed to public policy and natural justice and which is based on immorality and unchastity.

The custom in question is one which requires or encourages a widow by promiscuous and illicit sexual intercourse to raise up seed after his death to her husband and thus unnaturally and unjustly to oust the rights of his legitimate male issue of his other wives in the ownership of the estate of an heirless house.

The custom is manifestly immoral and repugnant to Christian principles and is thus opposed to public policy.

The Courts of these Territories are required by the Annexation Acts to administer the Common and Statutory Laws in force herein, but with the discretion under Section 104 (1) of the Magistrates' Courts Proclamation, 1923, in civil suits or proceedings between Natives involving questions of customs followed by the Natives, to decide such questions according to the Native Law applying to such customs. Such application of Native Law, however, must be within such limits as the law of this country permits. *Nbono versus Manoxoweni* (6 E.D.C., 62, at page 73). Section 11 (1) of the Native Administration Act, 1927, re-enacts the provisions of the above-quoted Proclamation in regard to the application of Native Law in Courts of Native Commissioners, but provides that such law shall not be opposed to the principles of public policy and natural justice, and provides further that it shall not be lawful for any Court to declare that the custom of lobola or similar custom is repugnant to such principles.

Native law and custom, it is submitted upon the authority of the decisions of the Supreme Court, is only applicable in these Territories in cases where it is not opposed to public order, public policy, morality, equity and justice. *Ncotama versus Ncume* (10 E.D.C., 207, at page 209); *Ngqobela versus Sihele* (10 S.C., 346, at pages 353 and 356); *Nbono versus Manoxoweni* (6 E.D.C. 62 at pages 66, 70 and 73).

The Court must refuse to recognize principles of Native Law abhorrent to the principles of the law of this country. *Nbono versus Manoxoweni* (6 E.D.C., 62, at page 66).

This Court has refused to apply Native Law which is repugnant to justice and equity, *Nolanti versus Sintenteni* (1 N.A.C., 43), or which is in conflict with the law in force in these Territories and contrary to good policy and public morals, *Mqolora versus Jim Meslani* (1 N.A.C., 97); *Ntame versus Mbede* (3 N.A.C., 94); *M. Masheme versus S. Nelani* (4 N.A.C., 42); and *Nceli Sitinga versus Nowaka* (4 N.A.C. 301).

Illegitimate children are regarded as having no father. Maasdorp's Institutes of Cape Law, 3rd Edition, Volume 1, page 10.

It would also appear that according to the principles laid down by the Supreme Court in the case of *Ngqobela versus Sihele* (10 S.C., 346, at page 354), Native Customs opposed to our own laws in the abovementioned respects require special legislative recognition in order to have the force of law. Marriages according to Native Custom were thus specially recognized by Proclamations Nos. 110 of 1879, 112 of 1879, 140 of 1885, 446 of 1906, and 142 of 1910. The law of bigamy does not apply to Native marriages, Section 168 of Act No. 24 of 1886, and abduction (*ukntwala*) is a criminal offence under certain circumstances.

I feel that this Court is obliged to apply these rules in these Territories, considerations of expediency notwithstanding.

For the foregoing reasons I consider that the appeal should be allowed.

1923, March 22.

Umtata.

SITWAYI *vs.* ZAKE.

(Engcobo Case.)

Before J. M. Young, A.C.M., President, with R. H. Wilson
and J. W. Mitchell as Assessors.

Trespass—Plaintiff must be in lawful occupation.

JUDGMENT.

By President: The Appellant sued the Respondent for the sum of £16 damages for the trespass of Respondent's cattle on Appellant's cultivated land. The Respondent denied that any of his cattle trespassed on Appellant's land or that they destroyed any of his crops.

The Magistrate found that Appellant was not in lawful occupation of the land on which the trespass is alleged to have taken place and dismissed the summons with costs.

The record supports the Magistrate's finding. In view of the ruling in the case of Motseki Pepenene *versus* Isaiah Morai heard in this Court at Kokstad in December, 1921 (4 N.A.C. 357) and previous decisions the appeal is dismissed with costs.

1923, November 9.

Umtata.

MPAPAMA *vs.* MGQIBI.

(Umtata Case.)

Before J. M. Young, A.C.M., President, with E. G. Lonsdale
and F. N. Doran as Assessors.

Pound regulations—Intimation of intention to claim special damages not a bar to subsequent claim for trespass fees.

JUDGMENT.

By President: In this case the Plaintiff impounded 23 head of cattle belonging to Defendant and at the time verbally informed the Poundmaster that he was not satisfied with ordinary trespass fees and would claim special damages. This was subsequently confirmed in writing by his Attorneys and a letter of demand sent for £15 damages.

Action is now brought for the recovery of 23s. the ordinary trespass fees and Defendant pleaded "that Plaintiff is not now entitled to call upon him for trespass fees as having impounded the cattle such fees should have been claimed from him before the cattle were handed over to him."

The Magistrate dismissed the summons on the ground that under the Pound Regulations the impounder has one of three options and that having once made his election he cannot change his mind and adopt one of the other courses.

This decision apparently is based on Section 67 of Proclamation No. 387 of 1893. It will be observed that this section only debars a person who has claimed damages under Sections 28 and 29 of the Pound Regulations from afterwards requiring an assessment by a Field Cornet, or a Referee and Arbitrators. It further debars any person who has claimed such damages (i.e. damages under Sections 28 and 29) or such assessment from afterwards seeking redress by legal process. It does not say that any person who has intimated his intention of claiming special damages shall be debarred afterwards from claiming trespass fees.

It is clear that Plaintiff never claimed damages under Sections 28 and 29 and it would seem therefore that Section 67 does not apply. Further the damages mentioned in Section 67 are those referred to in Sections 28 and 29 under the tariff in Schedules B and C and not under Schedule H, which is the tariff for trespass in Native Locations. For this reason also Section 67 does not, in the opinion of this Court, apply.

Under these circumstances the Court has come to the conclusion that the Magistrate has erred and that the Plaintiff has not been deprived of his right to proceed at common law for trespass fees. The appeal is allowed with costs, the Magistrate's ruling dismissing the summons set aside and the case returned to be heard on its merits.

Note: One of the Assessors, Mr. E. G. Lonsdale, dissented.

1923, December 10.

Kokstad.

NOTA *vs.* MASETI.

(Mount Frere Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and F. H. Brownlee as Assessors.

Procedure—Point not pleaded may not be raised for first time on appeal—Trespass—Assessment not necessary in all circumstances before damages can be claimed.

The facts are immaterial.

Appellant's first ground of appeal read as follows:—1. "That the evidence discloses the admitted facts that the land alleged to have been trespassed upon is not enclosed with a fence and is situated on the Salvation Army farm, which is also not enclosed with a fence and which is a private holding situated within a Crown Native Location known as Cancele Location; and therefore, under Section 3 in the Schedule annexed to Proclamation 22 of 1913, no action or claim for damages because of trespass on and in respect of the said land lies and consequently Plaintiff has no cause of action against Defendant."

JUDGMENT.

By President: The contention set forth in the first ground of appeal was not specifically pleaded as in the opinion of this Court it should have been, if relied upon and cannot now be considered. In any case it has not been proved that the land in question falls within the terms of Proclamation No. 22 of 1913. This Court is not prepared to say that the Magistrate erred in finding that the Defendant's cattle did trespass as alleged, nor, in its opinion, do the Pound Regulations require as assessment, in all circumstances, before damages can be claimed.

The appeal is dismissed with costs.

1924, July 16.

Umtata.

MNUNU vs. NGQENGELELE.
(Mqanduli Case.)

Before J. M. Young, A.C.M., President, with W. Carmichael and F. N. Doran as Assessors.

Trespass—"Igadi" or "Intsimi"—Proclamations 125 of 1903 and 310 of 1913.

Plaintiff claimed from Defendant £5 as damages for wrongful and unlawful impounding and alleged *inter alia*: That the Defendant's action in impounding the cattle is wrongful and unlawful, *firstly* because the ground trespassed upon is an "Igadi" situate in Native Location amongst homesteads and is insufficiently fenced. Defendant, therefore, according to law had no right to impound Plaintiff's cattle. *Secondly* because the ground trespassed upon is situate in a Native Location adjoining that of Plaintiff's and Defendant did not first take the stock to or notify Plaintiff of the trespass or demand damages from Plaintiff in terms of Proclamation 60 of 1910, Section 77.

Defendant admitted that his wife impounded the cattle but denied that it was either wrongful or unlawful and stated that she, his wife, was unaware to whom the cattle belonged.

The Magistrate entered judgment for Plaintiff.

JUDGMENT.

By President: The provisions of Proclamation No. 310 of 1913 not having been extended to the District of Mqanduli, land held under the provisions of Section 3 of Proclamation No. 125 of 1903 stands on the same basis in regard to the law of trespass as grants under Section 5 of the same Proclamation. There is thus no need to go into the question whether this is what is called an "igadi" or an "intsimi" but which ever it is the Defendant is equally entitled to claim damages for trespass thereon. Apart from this question it is abundantly clear that the land was granted and is still held as an arable allotment.

The appeal is allowed with costs and the Magistrate's judgment altered to Judgment for Defendant with costs.

1924, November 24.

Umtata.

SIKAHLA *vs.* DUMEZWENI.

(St. Marks Case.)

Before W. T. Welsh, C.M., President, with J. M. Young and
O. M. Blakeway as Assessors.

Damages—Horse injured whilst in possession of Impounder.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Defendant, now Appellant, through his agents, found the horses of the Plaintiff, now Respondent, trespassing in his land in the late afternoon and placed them in his cattle kraal together with a bull and some oxen belonging to himself. During the night one of the Plaintiff's horses was gored and died from the injuries inflicted.

There is no dispute as to the facts and the sole question for this Court to decide is whether the Magistrate was justified in awarding the Plaintiff the value of the horse as damages.

It is contended for the Appellant that his action was in accord with native practice and that he is, accordingly, not liable. The liability for unintentional injury depends upon *culpa*—the failure to observe that degree of care which a reasonable man would have observed.

The Defendant admits that he usually tethers his own horses outside the cattle kraal to safeguard them, and in this Court's opinion his action in placing the Plaintiff's horses with a strange bull and oxen in his kraal is conduct amounting to negligence. In the case of *Molefe versus Mdihe* (1919 E.D.L. 117) Mr. Justice Kotze said "It is incumbent on a person who seizes animals trespassing in lands with a view to taking them to the pound, to bestow proper and reasonable care in regard to them. Not merely may he not detain them for more than 24 hours, he must likewise, while they are being detained and in his custody, whether within or beyond this statutory period, act with due and ordinary care in regard to them."

These principles appear to be applicable to the present case and in the opinion of this Court the Magistrate was correct in finding the Defendant liable.

The appeal is dismissed with costs.

1924, November 25.

Umtata.

MADLU *vs.* NJENGELE.
(Qumbu Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway
and H. E. F. White as Assessors.

*Damages—Negligent handling of trespassing stock—Stock
driven to vicinity of another land by owner of first land—
Liability for second trespass.*

Plaintiff's cattle trespassed in Defendant's land. Defendant drove the cattle (which were unattended) out of his land and then drove them some distance further where he left them. They then trespassed in Skepe's land who demanded and obtained damages from Plaintiff. Plaintiff sued Defendant for the amount of these damages. The Magistrate awarded damages as prayed and Defendant appealed.

JUDGMENT.

By President: The Magistrate appears to have gone fully and carefully into this case and has found that the action of the Defendant in driving the cattle to the vicinity of Skepe's land, which is some considerable distance from the spot where he took possession of them, and abandoning them there was the proximate cause of the trespass in Skepe's land.

There is nothing on the record to show why the Defendant drove the animals all that distance instead of leaving them in the valley referred to by the Magistrate; and, in the absence of anything to justify his having done so, this Court is of opinion that the Magistrate has come to a correct conclusion.

The appeal is dismissed with costs.

1927, March 1.

Umtata.

NGCANGA *vs.* SIDLAYI.
(Engcobo Case.)

Before W. T. Welsh, C.M., President, with R. H. Wilson
and E. G. Lonsdale as Assessors.

*Trespass of stock—Demand for trespass fees—Subsequent
claim for damages barred—Election—Estoppel—Pound
regulations.*

JUDGMENT.

By President: The Plaintiff in reconvention claimed from the Defendant in reconvention six bags of mealies or their value £4. 10s. being damages to his crops by the Defendant's stock, less half a bag or its value 7s. 6d.

This claim was made in July last in respect of trespasses which had occurred between November, 1925 and May, 1926.

It is quite clear that in connection with each of these trespasses a formal demand was made upon the Defendant for trespass fees. For the Appellant it is contended that having

claimed trespass fees it is not competent for the Plaintiff thereafter to institute an action for damages.

In the case of *Jika Kubela versus Annie Scheepers* (3 N.A.C. 209) it was ruled, following the decision in the case of *Mason versus Dihning* (20 S.C.R. 338) that a proprietor of land seizing trespassing stock must elect which of the three remedies provided by the Pound Regulations he will seek, and having once elected to adopt one course he cannot afterwards change his mind and pursue another. In the case of *Moshi Mbaubonduna versus Luhani Lyonase* (4 N.A.C. 353) this Court held that a demand for trespass fees would bar an action for damages.

Applying these principles to the present case this Court is of opinion that Plaintiff having seized the trespassing stock and having demanded trespass fees would not be entitled after a considerable lapse of time to abandon whatever claim he might have had for trespass fees and to institute an action for damages.

In the opinion of this Court the case of *Joseph Mpapama versus Mggibi Dlelapantsi* * referred to on behalf of the Respondent can be distinguished from the present case.

The appeal will be allowed with costs and judgment entered for the Defendant in reconvention with costs.

* Page 172 of these reports.

1927, July 21.

Umtata.

MAMTOLO *vs.* TSHEMESE.
(Tsolo Case.)

Before J. M. Young, A.C.M., President, with R. H. Wilson and F. N. Doran as Assessors.

Trespass—Wrongful impounding of stock—Section 21 of Proclamation No. 387 of 1893—"Found trespassing," meaning of.

Respondent claimed damages from Appellant for wrongfully impounding certain of his stock. Appellant admits that when she seized the animals for the purpose of impounding them they had moved off the property trespassed upon, and were on the commonage. The Magistrate held that the impounding was unlawful and awarded Respondent damages.

JUDGMENT.

By President: In this case it is quite clear from the evidence of the Defendant herself that when she seized the animals for the purpose of impounding them, they had moved off the property trespassed upon and were on the commonage.

Under the circumstances they cannot be held to have been "found trespassing" within the meaning of Section 21 of Proclamation No. 387 of 1893, see *Prince versus Graetz*, (1921 E.D.L. 64).

The appeal is dismissed with costs.

1925, November 21.

Umtata.

FANEKISO *vs.* SIKADE.

(Umtata Case.)

Before W. T. Welsh, C.M., President, with R. H. Wilson
and G. M. B. Whitfield as Assessors.

*Testamentary dispositions—Proclamation 142 of 1910, Section
8 (1) “Allotted by him under Native Custom”—Con-
struction of—Property—How allotted by Native Custom.*

The facts are sufficiently clear from the judgment of the
Native Appeal Court.

JUDGMENT.

By President: Plaintiff, now Appellant, sued Defendant,
now Respondent, in the Court below in an action wherein he
claimed the delivery of 22 head of cattle or their value £110,
54 sheep or their value £27, 20 goats or their value £10, and
2 horses or their value £10, which he alleges is property left
in the Great House of the late Klaas Mkutu.

In the particulars of claim attached to his summons he
stated—

- (1) that he is the son and heir of the Great House of the
late Klaas Mkutu according to Native law and cus-
tom;
- (2) that the property claimed is that which was allotted
by the said late Klaas Mkutu to his Great House;
- (3) that Defendant is in possession of the said stock and
neglects and refuses to deliver same to him.
- (4) that he (Plaintiff) is by Native law and custom the
owner of the said stock and that Defendant has no
legal right to the possession of the same.

The Defendant pleaded:—

- (1) He admits paragraph 1 of the summons.
- (2) He denies paragraph 2.
- (3) With regard to paragraphs 3 and 4 he states that the
property claimed was bequeathed to him by will ex-
ecuted by the late Klaas Mkutu.

A copy of this will was put in by the parties and reads as
follows:—

“ This is the last will and testament of me Klaas Mkutu
of Tyalibonga’s Location in the District of Umtata who
being of sound and disposing mind desire that the whole
of the estate that shall be left at my death shall devolve
upon and become the property of my son Ernest Mkutu
also known as Sikade Klaas.

“ I nominate and appoint my said heir to be the ex-
ecutor of this my last will and administrator of my
estate.”

It is common cause that the property claimed was shown in the inventory by the Executor of the Estate and in the Administration account filed with the Master of the Supreme Court, and that the Plaintiff protested against such inclusions.

The only evidence of record is that of the Plaintiff who alleges, *inter alia*, that his father Klaas Mkutu inherited property from his father Mkutu, that in due course his father had three wives, that there was no male issue in his Right Hand and Qadi Houses, that a daughter of the Right Hand House married and her dowry went by custom to the Great House, that there were five children of the Great House, the eldest of whom, Patabantu a male, died in 1918 without male issue, that his widow had a son after his death but he died in infancy, that Patabantu left 9 cattle, 57 sheep, 27 goats and 2 horses which his father inherited as heir, and that a daughter of the Great House got married and that her dowry went to the Great House.

Plaintiff, who is thus the eldest surviving son of his father, claims that these are the sources whereby his father acquired stock and claims to be the sole heir to the whole of his late father's estate no matter to what house it originally belonged, there being no sons in the minor houses and the Defendant, now Respondent, being his younger brother in the Great House.

Judgment was given in favour of the Defendant, and, in his reasons, the Magistrate held that as the Plaintiff had not proved that the property in question had been specifically allotted under Native custom to any of the houses of which he is heir, Section 8 (3) of Proclamation No. 142 of 1910 applies and the late Klaas Mkutu would appear to have acted legally in devising it by will.

Against this judgment the Plaintiff has appealed. The grounds of appeal are—

- (1) that the Magistrate's interpretation of the provisions of sub-section (1) of Section 8 of Proclamation No. 142 of 1910, in holding that specific allotment, *ipso facto*, is the only form of allotment contemplated by the said section, and that allotment *de jure* (i.e. by operation of Native law and custom) is excluded, is wrong in law;
- (2) that the Magistrate's judgment should have been for Plaintiff as prayed.

In support of the above contentions Appellant further stated in his notice of appeal—

- (a) that the words "allotted by him under Native custom" do not only mean "specific allotment" but also such allotment as Native law and custom would recognize, and that the Magistrate was wrong in placing a restrictive interpretation on the word "allotted" and thereby restricting its meaning.
- (b) that the fact that all the property claimed was placed by the late Klaas Mkutu at his Great Kraal, which in terms of sub-section (2) of Section 8 of the said

Proclamation devolved upon Plaintiff, was in Native law and custom an allotment to that House, and that unless he publicly or in terms of Section 11 of the Proclamation disinherited his eldest son, such act on the part of the deceased would be construed as being "allotted by him by Native custom" to the Great House;

- (c) that the intention of the Legislature to restrict the testamentary bequest of property to the detriment of heirs by Native law and custom is clear, and that that intention is not being given effect to by the limited and restricted interpretation which the Magistrate has placed upon the word "allotted;"
- (d) Section 12 of the Proclamation further clearly anticipates dual administration of Native estates where a native has left a will.

At the request of the parties certain points in issue were put to the Native Assessors who stated:—

- (1) That all property not otherwise allotted belongs to the Great House.
- (2) That adventitious property acquired by the kraalhead belongs by custom to his Great House.
- (3) That allotments of property of the Great House to minor Houses may only take place in consultation with the wife and eldest son of such Great House.
- (4) That a kraalhead cannot own property personally which does not belong to one or other of his houses.
- (5) That the earnings of the various wives and the dowries of their daughters belong to their respective houses, except in the cases of the eldest daughters of minor houses whose dowries belong by custom to the major house providing the dowry of the wife of such minor house.
- (6) That the Right Hand House is established by the allotment according to custom of cattle from the Great House which thereafter belong to and are earmarked for such Right Hand House.

The crisp point for decision in this case is the interpretation to be placed upon the words "allotted by him under Native custom" in Section 8 (1) of Proclamation No. 142 of 1910.

For Appellant it was argued that these words embrace not only specific allotments which a man may make to his various houses, but also include property which by Native law and custom appertains and belongs to such houses without any definite overt act.

It was contended by Appellant that property inherited by a kraalhead from his father belonged automatically to his Great House and that according to Native custom no specific allotment of property is made to a Great House. The view was also pressed that it would be an anomaly to insist upon the specific allotment of property to a house to which it

already belonged by operation of Native custom and that it was not the intention of the Legislature that there should be a specific allotment in such cases.

Against this it was contended for the Respondent that as the common law rights of the testator were being curtailed the interpretation should be restrictive and the words in issue construed to embrace only specific or overt allotments of property to his various houses and that the remaining property in the estate could be devised by will.

“ In the interpretation of statutes a thing which is within the letter of a statute is not within the statute unless it be also within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention. Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many.

“ To arrive at the real meaning it is always necessary to get an exact conception of the aim, scope, and object of the whole Act; to consider, according to Lord Coke: 1. What was the law before the Act was passed; 2. What was the mischief or defect for which the law had not provided; 3. What remedy the Legislature has appointed; and 4. The reason for the remedy. According to another authority, the true meaning is to be found, not merely from the words of the Act, but from the cause and necessity of its being made, which are to be ascertained not only from a comparison of its several parts, but also from extraneous circumstances. The true meaning of any passage, it is said, is to be found not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from those circumstances, which the Legislature had in view. Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

“ As regards the history, or external circumstances which led to the enactment, the general rule which is applicable to the construction of all other documents is equally applicable to statutes, viz.: that the interpreter should so far put himself in the position of those whose words he is interpreting as to be able to see what those words relate to.” Maxwell on the Interpretation of Statutes (4th Ed. pp. 27-28 and 30-32).

It is obvious from a careful consideration of the preamble and provisions of Proclamation No. 142 of 1910 that it was intended to restore the application of Native law and custom to many phases of Native life and property which prior thereto had perforce to be dealt with under the law of the Cape Colony in terms of the Annexation and other relevant laws.

From the public discussions which took place in the General Council when the draft was under consideration it is also

apparent that one of the main objects of the Proclamation was to remedy a state of affairs which was creating havoc in the administration of native estates. This view is also reflected in decisions and *dicta* of this Court.

In the case of *Kopman versus Nohakisi* (3 N.A.C. 228) this Court in considering the meaning of Section 7 (1) of the Proclamation decided that it does not require a specific allotment to be made to the various houses on the contraction of a marriage by civil rites, but that the husband shall declare and place on record what property has, under Native custom, already been allotted to each of his then existing houses. With that ruling this Court fully concurred in the case of *Pala Mbadamana versus Sarah Jane Mbesi* (4 N.A.C. 136).

It appears to be indisputable Native custom and has long been recognized by this Court that property not allotted to any of his houses belongs to a deceased's Great House, *Gwandumtntu versus Nota ka Dlikitela* (4 N.A.C. 146), and that it is not competent for a native to divert property from one of his houses to another or disinherit his heir without showing cause at a public meeting of relatives. *Nonayiti Tshobo versus Soja Tshobo* (4 N.A.C. 140); *Skota versus Tinti* (4 N.A.C. 145); and *Nojenti Mqotyana versus Nzamo Sihange* (4 N.A.C. 134).

Applying the principles already enunciated for the interpretation of statutes this Court is satisfied that the Proclamation in question was a remedial one intended to restore the application of Native law to the matters therein specified, and that it deliberately purposed to prevent the testamentary disposition of property except such as might fall within the terms of Section 8 (3).

To hold that stock which, according to Native custom, appertains to and is the property of the Great House can be devised by will would, in the opinion of this Court, be contrary to the spirit and even the letter of the Proclamation, and would certainly cut athwart basic principles of Native custom which this Court has recognized in numerous decisions.

In the absence of language clearly indicating a contrary intention this Court has arrived at the conclusion that the true construction to be placed upon Section 8 (1) of Proclamation 142 of 1910 in this case is that the words "allotted by him under Native custom" do not include only property specifically set aside and allocated, but also embrace such stock as by the operation of Native law and custom appertained to and was, at the time of the late Klaas Mkutu's death, the property of his Great House, to which the Appellant is heir and from which position he has not been deposed.

In the opinion of this Court the property was not capable of being devised by will as falling within the terms of Section 8 (3) of the Proclamation.

The appeal will therefore be allowed with costs and judgment in the Court below altered to one for the Plaintiff with costs of suit.

Note:—The judgment of the Native Appeal Court was reviewed by the Eastern Districts Court and the following judgment was delivered on 16th July, 1926.

1926, July 16.

KLAAS *vs.* WELSH N.O. AND KLAAS.

Van der Riet, J.—This is a review of the proceedings of the Native Appeal Court for the Transkeian Territories, on the ground of gross irregularity. There is no appeal in law from the decision of this Appeal Court, nor is there any express provision in the Proclamation No. 145 of 1923 for any review of the proceedings of such Court, Section 101 (2) only providing for the retention by the Supreme Courts of the power to review and correct the proceedings of any Magistrate's Court. It is, however, well-established that this Court has power to review proceedings of the Native Appeal Court on the ground of gross irregularity.

Before the grounds relied upon can be appreciated it is advisable to state shortly the nature of the case. One Fane-kiso Klaas sued Sikade Klaas in the Court of the Magistrate of Umtata for the delivery of certain cattle, sheep, or payment of their value. The particulars alleged that the Plaintiff was the son and heir of the Great House, that the property in question had been allotted by the said late Klaas Mkutu to the Great House, that Defendant was in possession of the stock and refused to deliver same to the Plaintiff, that Plaintiff was by Native Law and Custom the owner of the said stock and that the Defendant had no legal right to the possession of the same. To this the Defendant filed an objection to the effect that the property claimed had been bequeathed to the Defendant by the late Klaas Mkutu by will dated 11th July, 1922, that the Plaintiff knew of this fact and had lodged an objection to the administration of the estate under the will and challenged the validity of the said will. As the Plaintiff claimed *ab intestato* and the Defendant by testament the Court in deciding the case would have to decide the validity or otherwise of the will and the Defendant objected to the action being heard as by Section 37 (d) of Proclamation No. 145 of 1923 the Court had no jurisdiction.

The plaintiff in reply admitted that he had lodged an objection with the Master of the Supreme Court against the confirmation of the Liquidation and Distribution Account in the estate of the late Klaas Mkutu on the ground that the property therein referred to was the Plaintiff's by Native Law and Custom. He denied that he challenged the validity of the will. On the other hand he admitted its validity and that under and by virtue of it the Defendant had been appointed sole heir of the late Klaas Mkutu. Plaintiff next stated that he claimed the property in terms of Section 8 (1) of Proclamation No. 142 of 1910 and brought the present action in the Magistrate's Court, with the knowledge and approval of the Master of the Supreme Court, in terms of Section 12 (1) of that Proclamation, and he prayed that the objection might be dismissed with costs.

Now Section 8 of the Proclamation provides that upon decease of any native to whom the provisions of the Proclamation apply all movable property belonging to such deceased person and allotted by him under Native Custom to any wife

or house not disentitled to recognition, shall devolve and be administered according to Native Law, but that the remaining movable property belonging to such deceased person shall be capable of being devised by will according to the law of the Colony. It specifically provides moreover that no testamentary bequest of movables allotted as aforesaid shall be valid but a testamentary bequest of other property shall not be invalid merely because it is contained in a will or other testamentary document embracing such invalid bequest. Section 12 (1) of the Proclamation provides that in regard to the administration of property devolving according to Native Law under the provisions of the Proclamation no letters of administration shall be necessary. "Any suit between native and native in regard to any such property shall be determined according to Native Law in the Court of the Resident Magistrate subject in all cases to appeal to the Native Appeal Court." Sub-section (2) provides that in regard to the administration of property devisable by will under the provisions of Section 8 (3) and so devised, the law of the Colony shall apply. The Magistrate overruled the objection with costs.

The Defendant then filed a plea denying the Plaintiff's denial that he challenged the validity of the will, and again alleging that the property claimed was bequeathed to him by will executed by the late Klaas Mkutn. After hearing evidence the Magistrate held that as it was common cause that the deceased man had during his lifetime made no allotment of any of his property to any of his houses he had acted legally in devising property by will which had not been specifically allotted, and he gave judgment for the Defendant with costs. The Plaintiff thereupon appealed to the Native Appeal Court on the ground "that the Magistrate's interpretation of the provisions of Sub-section (1) of Section 8 of Proclamation No. 142 of 1910 in holding that specific allotment *ipso facto* is the only form of allotment contemplated by the said Section and that allotment *de jure* (i.e. by operation of Native Law and Custom) is excluded, is wrong in law, and that the statement by the Magistrate in his reasons for judgment that it was common cause that the deceased had made no allotment was not admitted unless the word 'specific' was inserted before the word allotment." It was claimed for the Appellant that the fact that all the property claimed was placed at his Great Kraal by the deceased was in Native Law and Custom an allotment to that house and that unless he publicly or in terms of Section 11 of the Proclamation disinherited his eldest son such act on the part of the deceased would be construed as being an allotment by him by Native Custom to the Great House. Further, that it was clearly the intention of the legislature to restrict the testamentary bequest of property to the detriment of heirs by Native Law and Custom, and that that intention would not be given effect to by the limited and restricted interpretation of the word "allotted" placed upon it by the Magistrate, while Section 12 of the Proclamation clearly anticipates dual administration of native estates where a native has left a will.

The Defendant having been successful in the action and presumably not being desirous of having that judgment declared invalid lodged no cross-appeal against the decision of the Magistrate on the objection he had filed. The Native Appeal Court accordingly dealt only with the main judgment and upholding the contentions of the Appellant reversed the decision of the Magistrate.

There are three grounds upon which this decision is now sought to be aside by this Court. We shall consider these in the following order. Firstly, it is contended that the Appeal Court found that there had been an allotment without any evidence of such allotment. Now the evidence at the trial was to the effect that the deceased man had made no specific allotment to any wife but that the movable property claimed had partly come to him as heir of his father, partly as heir of his own son who had predeceased him, partly as dowry of a daughter of the Great House, and that the Plaintiff was the eldest surviving son of the Great House and had never been disinherited under the provisions of Section 11 of the Proclamation, while the Defendant was a younger son of that house.

It is stated in the judgment of the Chief Magistrate that at the request of the parties certain points in issue were put to the Native Assessors, and that these had stated—

- (1) that all property not otherwise allotted belongs to the Great House;
- (2) that adventitious property acquired by the kraalhead belongs by custom to his Great House;
- (3) that allotments of property of the Great House to minor houses may only take place in consultation with the wife and eldest son of such Great House;
- (4) that a kraalhead cannot own property personally which does not belong to one or other of his houses;
- (5) that the earnings of the various wives and the dowries of their daughters belong to their respective houses, except in the cases of eldest daughters of minor houses whose dowries belong by custom to the major house providing the dowry of the wife of such minor house;
- (6) that the Right Hand House is established by the allotment according to custom of cattle from the Great House which thereafter belong to and are earmarked for such Right Hand House.

The power to call such native assessors is given to the Appeal Court under Section 72 (3) of Proclamation No. 145 of 1923, presumably for the purpose of arriving at Native Law and Custom. This Court can hardly hold that it is now competent for it to find that findings of the Native Appeal Court based upon answers given by such assessors to questions put to them *at the request of the parties*, could not properly be arrived at by the Appeal Court. The Court could, therefore, hold upon the evidence taken by the Magistrate that all the property

belonged to the Great House, and that the deceased man did not own any property which did not belong to his Great House. Whether upon this the Appeal Court rightly held that "allotted" in Section 8 (1) of the Proclamation No. 142 of 1910 embraces all such stock as by Native Law and Custom appertained to the Great House even though there be no proof of specific allotment, is a different matter, but we have no power to deal with the correctness or otherwise of that decision.

We must hold, therefore, that the first ground for review cannot be sustained.

The second ground of review put forward is that in interpreting the meaning of the expression "allotted under Native Custom to any wife or house" the Appeal Court improperly and illegally referred to public discussions in the General Council when the draft was under consideration in order to arrive at the objects of the Proclamation. The Appeal Court was at a certain stage of its judgment considering the application of the well-known rule that in the interpretation of statutes regard might be had to the state of the law prior to this enactment and the mischief sought to be remedied. The Chief Magistrate then stated: "It is obvious from a careful consideration of the preamble and provisions of Proclamation No. 142 of 1910 that it was intended to restore the application of Native Law and Custom to many phases of native life and property which prior thereto had perforce to be dealt with under the law of the Cape Colony in terms of the Annexation and other relevant laws. From the public discussions which took place in the General Council when the draft was under consideration it is also apparent that one of the main objects of the Proclamation was to remedy a state of affairs which was creating havoc in the administration of native estates."

Now, it has frequently been laid down that in the interpretation of statutes passed by Parliament regard cannot be had to the reports of the debates of Parliament to ascertain the intention of the legislature. But here the Court did not refer to the discussion in the legislative body but to discussions which took place in the General Council, a body which, as a fact, had nothing to do with the enactment of the Proclamation. It is questionable whether this Court can exercise any power of review over the manner in which the Native Appeal Court arrives at any decision on a question of legal interpretation of a statute, but even if it were we are satisfied that under the circumstances the reference by the Court to the public discussions at the Council was a mere minor detail in the process of reasoning and it would be a wholly insufficient ground for setting aside the finding of the Court.

The last ground is, however, one of far greater substance. The Defendant now contends that the Magistrate had as a fact in the first instance no jurisdiction to try this case, that he should not have dismissed the objection, and that accordingly the whole of the later proceedings both before him and the Appeal Court were *ultra vires*. Now it will be remembered that the Defendant did not appeal against the decision

of the Magistrate on the objection taken to his jurisdiction; but this cannot alter the legal position, seeing that in a matter of this sort if the Magistrate by law had as a fact no jurisdiction to try the case jurisdiction will not have thereby been conferred upon him, for such jurisdiction cannot be conferred even by consent of parties. I have already referred to the terms of Section 37 (*d*) of the Proclamation of 1923. That section contains no exception or saving clause as in Sections 26 and 28 of the same Proclamation. Section 29 moreover reads "Subject to the provisions of this Proclamation and Sub-section 2, Section 6, of Union Proclamation No. 142 of 1910 the jurisdiction of the Court shall embrace all civil suits and proceedings. The Section 6 (2) referred to takes away from the Magistrates' Courts the trial of cases concerning registered and Common Law marriages. Where therefore it was desired to retain this limitation of jurisdiction it was expressly provided for in the Proclamation, and this may be of some importance in the consideration of the question whether the jurisdiction conferred under Section 12 (1) of Proclamation No. 142 of 1910 is modified by the terms of Section 37 (*d*) of Proclamation No. 145 of 1923 in that if in the case of Section 29 such special provision was made, it might be considered that again in Section 37 (*d*) provision would have been made if it had been intended to retain any jurisdiction conferred under Proclamation No. 142 of 1910 which might otherwise be taken away. That being so it will be necessary to consider in the first place the provisions of Section 12 (1) of Proclamation No. 142 of 1910. The property devolving according to Native Law dealt with in that section is either that which having been allotted in terms of Section 8 (1) cannot be dealt with by will, or that which has not been allotted, but has nevertheless not been disposed of by will, see Section 8 (3).

Now the section provides that any suit between native and native in regard to such property shall be determined according to Native law in the Court of the Magistrate subject to appeal to the Native Appeal Court. That by this is meant that the Magistrate is given exclusive jurisdiction in respect of such cases, is made quite clear from what next follows; for there it is provided that a suit not between native and native may be decided in any court of competent jurisdiction. Sub-section (2) provides that in regard to property devisable by will (because it has not been allotted) and *so devised*, the law of the Colony shall apply. Under Section 12, therefore, it is clear that in every case where a native has left no will all questions arising between native heirs must be tried in the Court of the Magistrate, and this provision is in no way affected by Section 37 (*d*) of Proclamation No. 145 of 1923. If, however, a native has left a will any dispute between native heirs about property not devised under such will must also be tried by the Magistrate according to Native Law. As regards disputes as to succession under the will, this Proclamation does not require these to be tried in the Court of the Magistrate, and it makes no provision as to the court which is to try whether any property as a fact has been devised

under the will; all it lays down is that property which can be devised and has been so devised shall be administered under Colonial Law.

Now, although this is prohibited it is clear that a native may as a fact wrongly include in his will a bequest of property which has been allotted. This is expressly provided against both in Sections 8 and 12, for in the former the particular bequest is declared to be invalid, in the latter it is provided that the law of the Colony shall apply to the administration of property which can be devised and has been devised to the exclusion, therefore, of any property devised by the invalid bequest. We have, it is contended by the Defendant, such a case here for the deceased left all his property to the Defendant and if any of the property of the deceased man had been allotted within the meaning of Section 8 (1) the bequest of such property to the Defendant would not, in terms of the last paragraph of Section 8, be valid, and in terms of Section 12 (1) the property would devolve according to Native Law, while the remaining property of the deceased, if any, which could be devised by will, such will being expressly declared valid as to the bequest of such remaining property, would have to be administered according to the law of the Colony.

Such being the provisions of Section 12 how are these affected by Section 37 (d) of the later Proclamation. It is contended for the Defendant that as *prima facie* the will left to him the property now claimed any decision of the Magistrate that such property had been allotted to a wife or house of the testator and that, therefore, the said property could not be validly bequeathed must be in effect a decision affecting the validity of the will, and the dispute between the parties was accordingly a matter in which the validity of a will is in question as to which he is expressly deprived of jurisdiction by the said Section 37 (d). There is certainly great force in the argument that such a decision must at least indirectly affect the validity of the will for it must be admitted that the validity of a will may be questioned either in regard to its execution, or wholly or in part in regard to the capacity of the testator to dispose of property, and the very wording of the last paragraph of Section 8 above referred to indicates that the bequest of "allotted" property is not "valid."

Does then Section 37 (d) take away from the Magistrate the jurisdiction to deal with this case which he had previously possessed under the Proclamation of 1910? As against such being the case it is contended for the Plaintiff that the real issue which the Magistrate was called upon to decide was whether or not the property had been allotted. If it was so allotted he alone could deal with the dispute between the parties, both being natives, unless the provisions of Section 12 which lay this down have been repealed by the later law. Now the Section 12 is not included among the laws expressly repealed as set out in the First Schedule to Proclamation No. 145 of 1923, and it is a well-established principle that where in any enactment there is an express repeal of specified laws it should not be held that any other law not there mentioned is

likewise repealed unless the terms of the law alleged to have been repealed are so clearly inconsistent with or repugnant to the provisions of the later law as to leave no doubt as to the intention of the legislature, and if the respective enactments can be reconciled with each other so as to give effect to both this rather should be the interpretation adopted.

I think it is very clear that it was the intention of the Governor-General under Proclamation No. 142 of 1910 to limit the power of natives to dispose of their property in a manner contrary to native custom either by marriage or by will, and to secure that questions relating to native marriages and succession should be dealt with by the Magistrates of the Transkei in accordance with Native Law. So it was provided that the property rights of native wives should not be interfered with by later marriages at Common Law, and that the property allotted to any wife or her house was to devolve and be administered according to Native Law, and that all questions relating to native marriages and between natives in regard to the succession to property under Native Law should be dealt with exclusively by Magistrates subject to appeal to the Native Appeal Court. It will be seen that the Proclamation does not provide that allotted property is not to be devised by will, but that property which is not allotted is capable of being left by will; in other words it first specifically provides that allotted property is to be dealt with according to native custom and then specifically provides that other property may be left by will and that then the law of the Colony shall apply to the administration of such property. This, I think, indicates that it was the intention that the will would only operate after it was established that the property dealt with in the will had not been allotted. Moreover the question of allotment was, I consider, deliberately left to the decision of the Magistrate.

The Proclamation of 1923 to a great extent recognizes that questions affecting natives are to be dealt with exclusively by Transkeian Magistrates, for in cases of disputes between natives determined by these Magistrates there is no appeal to a superior Court other than the Native Appeal Court, while an appeal lies to the Supreme Court if one of the parties is a European. Moreover it must be borne in mind that while in the Territories Native Laws and Customs have been recognized in various Proclamations and the Magistrates of the Territories have been given power to administer such laws and custom which are often in direct conflict with the Common Law of the Union, no similar power has been given to the Supreme Court as a Court of first instance, and as stated by De Villiers, J.P., in *Rakuba versus Rabuka* (1919, T.P.D., at page 346) such Court could not, therefore, apply Native Law except on appeal. There is, however, one provision in this Proclamation, that of Section 39, which might at first sight seem to contemplate that a Superior Court has jurisdiction to deal as a court of first instance with any class of case, including those wholly dependent upon Native Law and Custom, for in that section, which has been taken over from the Union statute, it is provided that any Defendant can require, under

certain conditions, that any suit if the amount of the claim exceeds £100, shall be removed to a Superior Court. This may create grave difficulty, but it will probably have to be held that no case dependent on Native Law and Custom which can only be dealt with by a Magistrate, can be removed. It is clear, I think, that where any special law has given to the Magistrate sole jurisdiction the general provisions of this Section 39 cannot operate for it is a principle of interpretation of statutes that there will be generally speaking a presumption that a special law remains in force unless it is expressly repealed by a subsequent general law, *Makoti versus Madupi* (1916, T.P.D. at page 394), applying *Garnett versus Bradley* (3 A.C., 944). I cannot come to the conclusion that the intention to leave to the Magistrate the determination of native cases according to Native Law which is so clearly expressed in general both in this Proclamation and in that of 1910 is negated by the terms of this Section 39.

Section 37 (*d*) has also been taken over from the Union Act. From the point of view of its effect on the general provisions of Section 29 of the Proclamation it may be said to be a special provision limiting the jurisdiction of the Magistrate but on the other hand it may be regarded as a general provision in so far as it affects the special provisions of the Proclamation No. 142 of 1910, which as already pointed out have not been expressly repealed by the later Proclamation.

Now it must be apparent that if the wide effect claimed for the Defendant is to be given to the terms of this section difficulties arise which I find it difficult to believe can have been contemplated by the legislature; for in every case where a will has been left disposing in general terms of the estate of a native, the heirs to the property allotted to his various houses would be required to vindicate their claims to such property, however small in value, in a Superior Court which would be called upon to apply Native Law and custom. Moreover if and when it is found in the course of the proceedings in the Superior Court that the will does not affect such property the dispute then becoming one between natives as to the succession to such property, the jurisdiction of the Superior Court would be ousted and the matter would, I think, have to be referred back to the Magistrate to be dealt with according to Native Law and custom. If on the other hand regard is had to the provisions of Sections 8 and 12 of Proclamation No. 142 of 1910 and it is concluded from these that it was the intention of the legislature that in such a case the first question to be determined is whether or not the property had been allotted and that only if it is held that there had been no allotment could there be any question as to the effect of any will, when the provisions of Section 39 (*d*) apply, there will be no difficulty experienced in reconciling those provisions with the earlier Proclamation and the general intention of the legislature, for the Magistrate would deal with the question of allotment applying Native Law and custom and if he finds that there has been an allotment he can carry out the provisions of Section 8 (1) and Section 12 (1) of Proclamation

No. 142 of 1910. If he finds that there has been no allotment the Plaintiff's claim *ipso facto* is disposed of.

Now bearing in mind that it is first expressly provided that allotted property is to devolve and be administered by native law and that it is only secondly and subject to this provision that testamentary power to bequeath any property is given to a native it does not seem to me an unreasonable interpretation of Section 37 (*d*) to hold that it does not affect the jurisdiction of Magistrates to deal with allotted property despite the existence of a will and that its provisions only apply to cases where the validity of the will is questioned in a matter governed by the common law or in terms of Section 12 (1) where the law of the Colony has to be applied; in other words to hold, as the Magistrate did, that there can be a *bona fide* dispute as to the validity of the will dependent upon a question of fact as to whether or not property claimed has been allotted under Native custom for that issue of fact is the sole question for his determination, because there can be no bequest of allotted property nor any *bona fide* reliance upon the terms of any will as far as such allotted property is concerned. The existence of the allotment and not the existence of the will is therefore the deciding factor.

For these reasons I think the Magistrate was right in disallowing the objection taken and that he had jurisdiction to try the case.

The application for review is accordingly dismissed with costs.

Pittman, J.: In the Magistrate's Court for the District of Umtata a Native Fanekiso Klaas, admittedly son and heir according to Native custom of the Great House of his late father, Klaas Mkutu, sued his full younger brother, Sikade Klaas, for the delivery of certain movables in the latter's possession, which he, the Plaintiff, Sikade Klaas, claimed as having been allotted to such Great House by the said Klaas Mkutu in his lifetime. To the summons setting forth this claim objection was taken under *Proclamation 145 of 1923, Order 12, 2 (2) (b)*. In support of this the movables claimed were stated to have been bequeathed in a will of the deceased, Klaas Mkutu, to the Defendant, and it was contended that, this will's validity being in question in the action, the Court in accordance with the terms of *Section 37 (d)* of the *Proclamation* had no jurisdiction in the matter. A plea was filed denying the allotment alleged in the summons and repeating the allegation that the property claimed had been bequeathed to the Defendant by will.

The objection was overruled and at the hearing the Plaintiff stated that he was the eldest surviving son of his late father and heir according to Native custom of his Great House. No specific allotment of the property in question by the deceased to such House was proved, but it was contended that none such was necessary to render property not otherwise specifically allotted property of the Great House, and it is common cause that there was no specific allotment made of any property in

deceased's lifetime in favour of any other house. No other evidence was led except that of certain documents admitted by consent, of which it is necessary to mention only the will, which is in these terms, viz. :—

“ This is the last will and testament of me Klaas Mkutu who desire that the whole of the estate that shall be left at my death shall devolve upon and become the property of Sikade Klaas.”

The date of this will is 11th July, 1922, and the deceased died on May the 14th, 1924.

The Magistrate, holding that there had been no allotment whatever of the property in question under Native custom by the deceased in his lifetime, and that therefore he had acted legally in terms of *Section 8 (3) of Proclamation No. 142 of 1910* in devising it by will, gave judgment in Defendant's favour. Against this the Plaintiff appealed to the Native Appeal Court on the sole ground that the Magistrate had erred in holding that in order to vest the property in question in deceased's Great House and in himself as heir thereof, any specific allotment was necessary, and before that Court it was argued on his behalf that allotment might take place *de jure*, operating in accordance with Native Law and custom. The appeal was contested on this issue alone, the question of jurisdiction not being raised, and the Appeal Court accepting Plaintiff's contention that specific allotment to the Great House and to himself as heir thereof was not essential to vest the property claimed in him, and there having been no allotment to any other House in the deceased's lifetime, reversed the Magistrate's judgment and awarded the property to Plaintiff. Defendant now brings the proceedings of the Appeal Court and of the Magistrate's Court into review before us, and asks that they be set aside on the following three grounds, viz. :—

- (a) That they were void for lack of jurisdiction in both Courts by reason of the enactment of *Section 37 (d) of Proclamation No. 145 of 1923*;
- (b) That there was no evidence whatever before the Appeal Court upon which its judgment could rest; and
- (c) That the Appeal Court in arriving at its decision irregularly took cognizance of discussions in the General Council of the Transkeian Native Territories, when the draft of *Proclamation No. 142 of 1910* was under consideration by such Council.

To deal in the first place with the third ground of review reference to the Appeal Court's judgment shews that that Court in order to arrive at a conclusion on the question of the main objects of the *Proclamation of 1910* did take into consideration the public discussions that occurred in the General Council before its promulgation, and *Mr. Lewis* on behalf of the present Plaintiff has referred us to certain authorities collected in *Beal's Cardinal Rules of Legal Interpretation, 2nd edition pp. 286-288*, on which he relies as establishing

that the Appeal Court's action was wholly irregular. I am far from satisfied, however, that the consideration given to these matters, extrinsic to the actual words of the enactment to be construed, in any way prejudiced the Plaintiff or would in the slightest degree justify us in setting aside the proceedings before the Appeal Court.

The second ground, whereon the proceedings below are sought to be set aside, appears to me equally unsubstantial. It is contended that there was no evidence of express allotment to the Great House, upon which could rest the Appeal Court's judgment in favour of the present defendant, but in the view that that tribunal took of the legal position of the parties, all the evidence necessary to its decision was before it. It was stated before the Magistrate that the deceased had made "no apportionment to any of his Houses or any of his sons," and this, in the Appeal Court's opinion, justified the conclusion that all property left at the death of deceased belonged to his Great House. I cannot see how in arriving at such finding the Court can in the circumstances be held to have been guilty of any such irregularity in its proceedings as would ground a claim for review.

The first ground of review is that neither the Magistrate's nor the Native Appeal Court had jurisdiction to determine the original claim. This was foreshadowed in the objection to the summons, which the Magistrate overruled, and though there was no appeal against his order on this point, we must take it that, if the Magistrate could exercise no jurisdiction in the matter, neither could the Appeal Court. The question we have to decide is whether it can rightly be said that the action before him was in the meaning of *Section 37 (d) of Proclamation No. 145 of 1923* a matter "*in which the validity or interpretation of a will was in question.*"

This inquiry is in my opinion considerably simplified by certain findings on Native Law set forth in the judgment of the Native Appeal Court. These, which were based on the opinions of Native Assessors called in by consent of parties and on previous decisions of the Appeal Court, may be stated as follows, viz:

- (1) That property not allotted to any of his houses belongs to a deceased's Great House; and
- (2) that stock, which is the property of the Great House, cannot be devised by will.

These propositions, which we must unreservedly accept, appear to me to compel us to answer the question in the negative. First of all the Plaintiff in his summons in the Magistrate's Court cannot, I think, be said to have made his claim as *heres ab intestato* in the sense which that expression would convey in our law. Had he occupied such position exactly, then I agree that the Defendant's objection was, apart from any consideration of the express provisions of *Section 8 of Proclamation No. 142 of 1910*, unsurmountable, but here the property claimed would seem according to the law applicable to the case to have been property belonging to his Great

House rather than to the deceased himself, and he too was precluded under such law from devising it by will. Then the provisions of *Section 8 of Proclamation No. 142 of 1910* appear to exclude the operation of any will upon property allotted, even if allotted merely *de jure*, as the Appeal Court held the property in question was, and I think the Magistrate could come to no other conclusion than that, when Defendant, in answer to the summons alleging the allotment, set up the existence of a will, he was not raising a genuine defence to the action. In other words the provisions of the will were not material to Plaintiff's claim.

I agree that the review summons must be dismissed with costs.

1927, August 15.

Kokstad.

TUKUTA AND NDELA *vs.* PANYEKO.

(Matatiele Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and E. W. Bowen as Assessors.

Inheritance—Succession to estate of deceased Native married according to Native Custom and Christian Rites—Respective rights of son of prior Native Custom marriage and widow of subsequent marriage by Christian Rites—Proclamation No. 142 of 1910, Sections 4 and 7.

The late Paulus Panyeko first married a wife by Civil rites, who died without issue. Thereafter he married Jane the mother of the Plaintiff Titus by Native Custom, and Plaintiff is the eldest son of that union. During the subsistence of this Native marriage Paulus married Annie (the Defendant) by Christian rites. There was no male issue. No declaration in respect of the subsisting Native marriage or allotment of property was made as required by the provisions of Section 7 (1) of Proclamation No. 142 of 1910.

Plaintiff claimed from Defendant an account and delivery of all property in the estate of the late Paulus to which he is entitled as heir to the estate.

Defendant claimed that she had the right to retain possession of the property.

The Magistrate gave judgment declaring Plaintiff to be the heir of the late Paulus whose estate vested in him, but that the Defendant was entitled to the control and custody of the said estate as long as she continued to reside at the kraal of her late husband or at a kraal approved of by the heir, without having the right of disposing of any of it except by the authority of the heir or his lawful representative. Costs to be borne by the estate.

The Plaintiff appealed against that part of the judgment awarding the control, custody and usufruct of the estate property to the Defendant.

JUDGMENT.

By President: In this case this Court agrees with the Magistrate's finding that a Native Custom marriage was duly contracted between the late Paulus Panyeko and Jane, and therefore Titus Panyeko issue of that union and Plaintiff in this action is heir to the estate of the deceased Paulus.

By virtue of Section 4 of Proclamation No. 142 of 1910 the Christian marriage between the late Paulus and Defendant Annie conferred no greater rights on the latter in respect of property than would have been the case had that marriage been one according to Native Custom. Such rights, in the opinion of this Court, would not exceed those of a minor wife.

On the pleadings and evidence before it, this Court is not in a position to determine the usufructuary rights of the Defendant Annie, who however as representing a minor house, would not in any case be entitled to the use of the whole estate of the late Paulus. Moreover the rights of Jane, whatever they may be, cannot be disposed of without a hearing.

Though the Plaintiff is heir and as such entitled to an account and control of the property in the estate of the late Paulus his rights are qualified by his obligations to maintain Defendant suitably, so long as she resides at the kraal of the deceased.

The appeal will be allowed with costs, and the judgment in the Court below amended to one in favour of the Plaintiff for an account and delivery of all property in the estate of the late Paulus Panyeko subject to his obligations to provide suitable maintenance for the Defendant in accordance with Native Custom.

As Plaintiff is a minor a guardian must be appointed to administer the estate. Such appointment to be subject to the approval of the Magistrate.

The Magistrate's order as to costs in the Court below will stand.

The cross-appeal has not been pressed, and will be dismissed with costs.

1927, December 8.

Kokstad.

MDLOZINI vs. MDLOZINI.
(Umzimkulu Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright
and W. H. P. Freemantle as Assessors.

*Estates—Application of Proclamation No. 142 of 1910 to the
administration of Native Estates—Inheritance—Rights
of sons who are the issue of two successive marriages by
Christian rites.*

JUDGMENT.

By President: It is common cause—

- (1) that Defendant is the eldest son of the late Mncanyana by Emma his first wife;
- (2) that Plaintiff is the eldest son of the late Mncanyana by Elizabeth his second wife;
- (3) that Mncanyana married his first wife by Native custom and subsequently by Christian rites;
- (4) that after the death of his first wife Mncanyana married Elizabeth by Native custom paying a dowry of 15 cattle for her;
- (5) that after the second wife had borne three children he married her by Christian rites on the 31st January, 1911, but before this marriage he settled 11 head of cattle on Elizabeth; and
- (6) that Mncanyana had two wives only, viz.: Emma and Elizabeth.

From the pleadings it appears—

- (a) that Plaintiff contends that on the death of the first wife (Emma) the joint estate of the parties was administered under Colonial law and wound up, the portions due to the children of the marriage being paid to them or secured by Kinderbewys, the marriage having been in community of property;
- (b) that Defendant admits that Emma's estate was duly administered and accounts therein filed with the Master of the Supreme Court, but denies that he ever received any inheritance therefrom;
- (c) that Plaintiff further contends that as the Christian marriage with his mother (Elizabeth) was solemnized after the promulgation of Proclamation No. 142 of 1910 such marriage *ipso jure* did not produce the legal consequences of community of property; and
- (d) that Defendant contends that all property left by Mncanyana at his death belonged to the Great House of which he claims he is the sole heir under Native Custom and also under the provisions of Proclamation No. 142 of 1910.

The grounds of appeal are as follows:—

- (i) That the judgment is wrong and contrary to law in that the first marriage of Plaintiff's and Defendant's father having been according to Christian rites the joint estate was upon the death of Defendant's mother, Emma, in accordance with the provisions of Proclamation No. 227 of 1898, dealt with and disposed of under Colonial law and, as there was no testamentary instrument, half thereof was awarded to the father or surviving spouse and half was divided equally between the children (including Defendant) the major children accepting their share and as to the minors the survivor securing the payment of same by a Deed of Kinderbewys and that being so there was no heir, no Great House or principal wife in accordance with Native law and custom which was by law excluded.
- (ii) That the Magistrate was further wrong in holding after he had decided that Native law and custom did not apply to the first marriage and that it was regulated according to Colonial law that under the second marriage which is governed by Proclamation No. 142 of 1910 that Defendant was the heir in face of the fact that Plaintiff is the eldest son of second marriage which the Magistrate held was to be adjudged according to Native law and custom.
- (iii) That in face of the Magistrate's ruling that there were two marriages of the father of the parties—that the first was a Colonial law marriage under which Native law does not arise and that the second was a Native custom marriage under which Colonial law does not apply that the Magistrate was wrong in holding that Defendant and not Plaintiff was the heir of the father.
- (iv) That the position is, in a small compass, Defendant being the eldest son of a Colonial law marriage has on intestacy no rights whilst Plaintiff being the eldest son of a Native marriage is legal heir of that marriage and the Magistrate was wrong in holding otherwise in his judgment.
- (v) That generally the Magistrate's judgment is wrong, bad and insupportable in law.

Proclamation 227 of 1898 referred to in the grounds of appeal is not in force in the district of Umzimkulu and therefore has no application in this case.

As the late Mucanyana died in 1926 his estate falls to be administered under the provisions of Proclamation No. 142 of 1910.

It was decided by this Court in the case of Fanekiso *versus* Sikade (page 178 of these reports) that property not allotted to any other house is the inheritance of the heir to a deceased's Great House. The defendant is the son of what would according to Native custom be the Great House and

Plaintiff the son of a minor house of the late Mncanyana. There is nothing to show that the estate now in issue is not the estate which existed when the late Mncanyana contracted his second marriage. Whatever the status of the second of two wives successively married by Christian rites may be, this Court is of opinion that they cannot exceed those of a minor house and that therefore the Plaintiff has no claim to property which was not specifically allotted to his mother.

In the opinion of this Court the estate of the late Mncanyana has to be administered in terms of Proclamation No. 142 of 1910 according to Native law and custom, that Defendant, the son of his first marriage, is heir thereto and that the Plaintiff has failed to establish his claim to be declared heir.

The appeal is dismissed with costs.

1923, July 14.

Umtata.

MBANYARU *vs.* MAZWI.

(Tsolo Case.)

Before J. M. Young, A.C.M., President, with O. M. Blakeway and P. G. Armstrong as Assessors.

“*Ukuketa custom*”—*Abrogation of by Proclamation No. 189 of 1922.*

JUDGMENT.

By President: In this case it is clear that dowry was paid and that the woman Matazana took up her residence at the Respondent's kraal. This constitutes a marriage according to native custom. The proceedings having been instituted subsequent to the promulgation of Proclamation No. 189 of 1922 no action lies for the recovery of dowry in cases of this nature. The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Defendant with costs.

1923, July 10.

Umtata.

NOYAMILE *vs.* BANTUBAKE.

(Umtata Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway and P. G. Armstrong as Assessors.

Widow's rights—Where widow holds title as registered owner of land, the fees for which have been paid by her out of her own earnings, any stock purchased from proceeds of produce grown on such land belong to her, and levy may not be raised thereon in an action against her son and heir.

The relevant facts are sufficiently clear from the judgment.

JUDGMENT.

By President: The Claimant, Noyamile Qalani, a widow, claimed in an interpleader action certain property attached in the suit of Bantubake *versus* Hoko Palane. The Magistrate declared the property executable and the Claimant has appealed.

Hoko Palane is son and heir to the Claimant. The property attached consists of stock purchased by the Claimant with the produce of a certain land.

The Claimant states that many years ago she was driven away from her late husband's kraal, that she went to Elliot, where she entered domestic service. On her return some three years ago she was again driven away by the eldest son of the Great House: she then went to reside at Twezi's kraal and while there acquired a land in her own name. At that time she had been a widow for some time and paid the necessary fees for the land out of her own earnings. It is admitted that this land is still registered in the Claimant's name. Whatever Hoko Palane's potential rights may be, they are in the opinion of this Court subordinate to those of the Claimant. As the stock attached was purchased by the Claimant from produce grown on the land acquired by her and registered in her name, this Court is of opinion that she is entitled to resist execution.

The Court is, therefore, of opinion that the Magistrate has erred. The appeal will accordingly be allowed with costs and the judgment altered to cattle declared not executable with costs.

1923, December 11.

Kokstad.

MDEMA *vs.* GARANE.
(Mount Ayliff Case.)

Before W. T. Welsh, C.M., President, with W. G. Wright and P. S. Laney as Assessors.

Widow's rights—Guardianship—Marriage by Christian rites—Woman the guardian of her minor child.

The facts are immaterial.

JUDGMENT.

By President: It was decided in the case of Ntoyi *versus* Ntoyi heard at Kokstad in December, 1920 (4 N.A.C., 172), and the case of Dlakiya *versus* Nyangiwe (4 N.A.C., 173), heard at Butterworth in March, 1921, that a widow acquires the rights of guardianship of her minor child issue of a Christian marriage. Proclamation No. 142 of 1910 specifically excludes Colonial Law from certain results which ordinarily follow the consummation of a marriage between natives by Christian or civil rites. A widow's rights of guardianship, to which Colonial Law entitles her, are not expressly excluded and this Court is, therefore, not prepared to rule that widows have been deprived of such rights.

The first ground of appeal has not been pressed. In regard to the third ground of appeal the Appellant has not shown that the articles claimed are his property. The appeal is dismissed with costs.

1927, April 8.

Lusikisiki.

MAKEXE AND MANGALISO *vs.* MAKILASI.

(Flagstaff Case.)

Before J. M. Young, A.C.M., President, with W. C. H. B. Garner and R. C. E. Klette as Assessors.

Declaration of rights—A widow married by Christian rites is guardian of her illegitimate children.

JUDGMENT.

By President: The Respondent, Plaintiff in the Magistrate's Court, sued the Appellant for a declaration of rights in respect of three children named Duma, Ntobezintle and Nomabandla, and for an order declaring him to be entitled to the care and custody of these children. The facts of the case briefly stated are:—

- (1) Plaintiff is the eldest son of the late Makexe and his wife Mantiyo
- (2) That Makexe and Mantiyo were married by Christian rites.
- (3) That Makexe died about fifteen or sixteen years ago.
- (4) That after Makexe's death his widow, Mantiyo, bore the three illegitimate children, the subject of this action.
- (5) The Defendant is the brother of Mantiyo.

On these facts the Magistrate found for Plaintiff and entered judgment for him as prayed with costs.

In the opinion of this Court the Magistrate erred in his judgment. The marriage of Mantiyo and the late Makexe having been contracted by Christian rites the Plaintiff is not the legal guardian of the illegitimate children born during the widowhood of Mantiyo, and during her lifetime he has no right to the custody of the children. As mother of the children not born in wedlock Mantiyo is their guardian and has the right of custody.

The appeal is allowed with costs and the Magistrate's judgment altered to absolution from the instance with costs.

1925, April 6.

Lusikisiki.

MVANA *vs.* MVANA.

(Ngqeleni Case.)

Before W. T. Welsh, C.M., President, with W. J. Davidson and H. S. Bell as Assessors.

Widow—Right to maintenance out of estate of late husband—Where stock to be kept.

Edward, the son of the late Diamond (and his heir), sued his mother, Dinah, for a declaration of ownership in regard to and the delivery of certain cattle, being the dowries of his two sisters whose marriages the Defendant had arranged and received the dowries. It was clear from the evidence that the

Plaintiff did not live at his late father's kraal nor did he help to maintain his mother and her family. The Magistrate gave judgment in favour of Edward, and Dinah appealed.

JUDGMENT

...By President: The cases of Lupuwana *versus* Lupuwana (I N.A.C., 72) and Gasa *versus* Gasa (IV N.A.C., 162) relied upon by the Magistrate dealt with assets in estates where the deceased had been married according to the law of the Colony, and do not, in the opinion of this Court, apply to the present case.

According to Native custom the Defendant is entitled to maintenance out of her deceased husband's estate of which this dowry forms part. The Defendant admits the Plaintiff is heir to her late husband's estate.

The appeal will be allowed with costs and the judgment in the Court below varied by ordering that the Defendant is entitled to be maintained out of the assets in the estate including the dowry cattle, which must be kept at her late husband's kraal.

1925, November 10.

Butterworth.

MALAHLA *vs.* NOSE. (Kentani Case.)

Before W. T. Welsh, C.M., President, with F. H. Brownlee and G. D. S. Campbell as Assessors.

Re-marriage of widow—Whether cattle paid as dowry or fine—Native Assessors' opinion.

Defendant's daughter N married X, who died. No cattle were returned to X's kraal by Defendant. Thereafter Plaintiff alleges he married N. The facts are that Plaintiff removed N to his kraal and on the arrival of Defendant's messenger paid him three cattle. There were no marriage ceremonies, though Plaintiff killed a goat and called some neighbours together and the woman was given milk.

The Magistrate, having regard to the fact that there is no fine for the "seduction" of a "dikazi," held that the payment must be presumed to be dowry and held that there had been a marriage between Plaintiff and N—which was the only point at issue.

Defendant appealed.

JUDGMENT

By President: The circumstances having been placed before the Native Assessors, Mabala, Veldman, Ndiyalwa, Dinizulu and Sokapase, they state that according to Native custom the cattle paid must be regarded as dowry.

The Magistrate found on the evidence that there was a marriage and that three cattle had been paid as dowry.

In view of this finding and the statement of the Native Assessors that the payment was dowry the appeal is dismissed with costs.

1925, December 1.

Lusikisiki.

KAPARI *vs.* POSSA.

(Tabankulu Case.)

Before W. T. Welsh, C.M., President, with O. M. Blakeway
and E. W. Bowen as Assessors.

*Mandament van spolie—Widow entitled to use of kraal
property while she resides there.*

K was of the opinion that the cattle appertaining to the Right Hand House of his late father were being mal-administered by the widow E. He therefore issued a summons for a declaration of rights, and pending the result of the case seized the cattle and placed them in the keeping of a third person.

The widow E applied for a *mandament van spolie*, which the Magistrate granted and against which K appealed.

JUDGMENT.

By President: In the opinion of this Court the Applicant is entitled to the use of the property appertaining to her late husband's estate while she continues to reside at his kraal, and in view of the fact that pending the result of the action already instituted by the Respondent he has removed this property from the kraal where the Applicant resides and has deprived her of the use and possession thereof she is entitled to the order made by the Magistrate.

The appeal is dismissed with costs.

1926, August 16.

Kokstad.

RASHULA *vs.* MASIXANDU.

(Mount Frere Case.)

Before J. M. Young, Ag. C.M., President, with F. E. H.
Guthrie and W. G. Wright as Assessors.

*Widow—Rights in property of late husband and to
maintenance.*

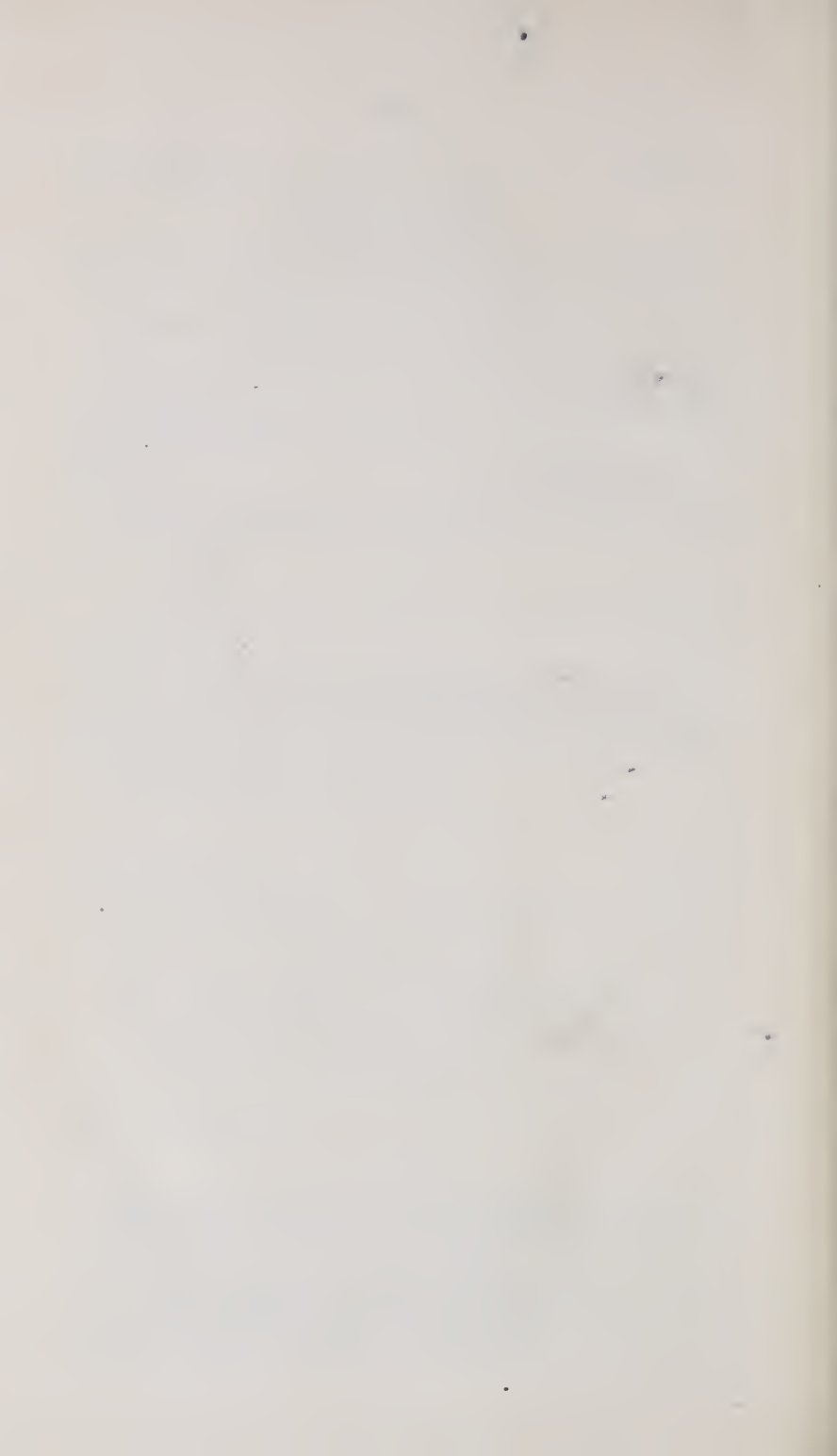
The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent, whom the Magistrate found to be the widow of Ndomane, sued the Appellant for delivery of certain grain, or its value, £13. 10s., and alleged that it was the crop reaped from a land, which it is not disputed in this Court, belongs to the kraal of Ndomane.

Appellant admitted that the grain claimed had been reaped from the land in question and that he had sold some of it on the instructions of Ndomane's heir, Lemane.





The Magistrate found that Respondent had been driven away by Lemane and that certain grain had been sold by Appellant, on the heir's instructions, and entered judgment for Respondent for half the crop reaped.

It is contended on behalf of Appellant that, on the admitted facts, and those found by the Magistrate, the Respondent was not entitled to succeed.

It has been held by this Court on numerous occasions to be indisputable Native custom that as long as she remains at her husband's kraal, or has not deserted the kraal, a widow is entitled to be properly maintained by the heir, and to be consulted by him in the disposal of the estate property. The estate devolves on the heir, who controls it and can dispose of it for the general benefit of the family, and the widow cannot claim to be placed in possession of it, or prevent the heir disposing of it, provided she is maintained in a suitable manner.

In the opinion of this Court the Magistrate has erred in ordering the Appellant to deliver portion of the grain to Respondent. Her action would seem to be one against the heir, Lemane, to show cause why he should not be ordered to maintain her in a manner suitable to her position.

The appeal is allowed with costs, and the Magistrate's judgment altered to judgment for Defendant with costs.

1926, November 3.

Butterworth.

NONENE *vs.* GUNYAZA.

(Tsono Case.)

Before J. M. Young, A.C.M., President, with F. H. Brownlee and A. L. Barrett as Assessors.

Torts arising from personal negligence—Liability of widow.

Plaintiff had sued Defendant for 15s. or one sheep for damages sustained by reason of Defendant's dogs having killed the sheep.

Defendant, a widow, pleaded that she was but an inmate of the kraal of her late husband, who left a son and heir and that as the entire estate vested in him she was not the owner of the dogs and, therefore, not liable for any damage caused by them.

The Magistrate found that as the result of an inquiry held by the headman the Defendant paid over one sheep to the Plaintiff to replace the one that had been killed, but when later she became aware of her so-called legal rights, she repossessed herself of the sheep.

The Magistrate further found that when the cause of action arose the Defendant was in control of the kraal and, therefore, entered judgment for Plaintiff as prayed.

Against this judgment an appeal was brought relying mainly on the ground that the action should have been brought against the estate.

JUDGMENT

By President: The decision in this case depends upon the question of the control of the dogs which did the damage, and in the opinion of this Court is not to be regarded as arising in the administration of the estate of the late husband of the Defendant.

It is clear that the Defendant herself was in charge of the kraal, and the tort arises from her personal negligence.

She is therefore the proper person to be sued.

The appeal is dismissed with costs.

1924, March 5.

Umtata.

MANGQUNGQA *vs.* FUZILE.

(Qumbu Case.)

Before W. T. Welsh, C.M., President, with P. G. Armstrong and R. H. Wilson as Assessors.

Procedure—Death of Plaintiff's wife after litis contestatio does not release Defendant from his liability for detention of the woman.

Plaintiff alleged that he married shortly after East Coast fever and that about the end of 1921, during his absence at work at Johannesburg, his wife deserted his kraal and returned to her father.

He claimed the return of his wife or the dowry paid for her.

The woman died after *litis contestatio*.

The Magistrate entered judgment for Plaintiff for two head of cattle or their value, £5 each.

JUDGMENT.

By President: It is clear that subsequent to the pleadings being closed and till shortly before judgment was given the Defendant was unlawfully detaining the Plaintiff's wife. The death of the latter does not, in the opinion of the Court, release the Defendant from the liability which has already attached to him for this illegal action.

In the circumstances Proclamation No. 189 of 1922 appears to have no application.

The appeal is dismissed with costs.

1923, July 19.

Butterworth.

MKONDWANA *vs.* MHLAKAZA.

(Tsono Case.)

Before W. T. Welsh, C.M., President, with R. D. H. Barry
and G. D. S. Campbell as Assessors.

*Right of woman to institute action on behalf of absent
husband.*

In this case exception was taken that Plaintiff had no *legitima persona standi in judicio* to maintain the action as she had no authority, express or implied, from her absent husband; see Section 51, Act No. 20 of 1856, and Rule 413 published under Government Notice No. 1244 of 1906. It was on record that Plaintiff was in touch with her husband, who sent down money to commence the action.

JUDGMENT.

By President: In the opinion of this Court the Plaintiff is not entitled to institute this action on behalf of her husband. The appeal is dismissed with costs.

1925, August 8.

Kokstad.

MAMANI AND MASIMINI *vs.* MANGELE.

(Mount Ayliff Case.)

Before J. M. Young, A.C.M., President, with H. E. Grant
and F. E. G. Munscheid as Assessors.

*Wife—Locus standi in judicio—Deserted by husband—Not
necessary to be assisted by him.*

JUDGMENT.

By President: The only ground of appeal that has been pressed is the first, namely: That the Claimant is a married woman and should have been assisted by or sued in the name of her husband.

As a general rule, subject to certain exceptions, a married woman can neither sue nor be sued alone. One of the exceptions is when she has been deserted by her husband.

In this case there is evidence to show that for some time past the Respondent's husband has not resided with her but is wandering about in the district of Mount Currie with another of his wives. This, in the opinion of this Court, amounts to desertion.

The appeal is dismissed with costs.

1923, November 9.

Umtata.

HOLI vs. TYANTYAZA.

(Mqanduli Case.)

Before J. M. Young, A.C.M., President, with E. G. Lonsdale
and F. N. Doran as Assessors.

*Custom—Nomination of Great Wife by Paramount Chief or
by one of lesser rank with consent of Paramount Chief.*

The facts are immaterial.

JUDGMENT.

By President: The Plaintiff in this case asks for an order to be declared the Great son of Defendant. It appears that Defendant has two wives, Noketi and Nowam. Plaintiff is the eldest son of Noketi, whom Defendant married many years before Nowam. Defendant contends that as he is of Royal blood as also is his wife Nowam he had, under Tembu Law and Custom, the right to nominate Nowam as his Great Wife and that he did so with the consent of his brother the late Langa a Chief of the Amanqabe clan a branch of the Pondo tribe which was driven from Pondoland and sought the protection of the Tembus and has now become incorporated with the Tembu Tribe.

The custom of selection of wives appears to be one which was vested in the Paramount Chief only who, when he selected his Great Wife, would call the members of the tribe and inform them of his intention. Her dowry would be paid by the tribe and she would then be named "mother of the tribe."

A Chief of the rank of Defendant might with the sanction of the Paramount Chief nominate his wife but he would be required first to obtain this sanction and then by public act or ceremony place his chief wife in her hut.

It is quite clear from the record that the Defendant did not obtain the sanction of the Paramount Chief of the Tembus and having failed to do so Nowam cannot oust Noketi, who was the first wife married, from her position as Great Wife. The appeal is dismissed with costs.

1925, December 7.

Kokstad.

FIKENI vs. LUKUNI.

(Mount Ayliff Case.)

Before W. T. Welsh, C.M., President, with R. D. H. Barry
and F. E. G. Munscheid as Assessors.

*Status of wives of commoner—No right to nominate Great
Wife—Custom of marrying wife into father's hut dis-
cussed. Status of third and fourth wives—Proof of varia-
tion from Native custom.*

In this case the main point argued on appeal was as follows:—L had four wives, the first two of whom had no male issue. There were sons in the third and fourth huts. L claimed that he had married his third wife into his deceased

father's (F's) hut to raise seed and that therefore the woman was not his (L's) wife but his father's (F's). He therefore claimed that the fourth woman married was his third wife and therefore under ordinary Native custom became the "Qadi" to the Great House and her eldest son the heir thereto.

As will be seen, however, from the judgment contention was not raised in the pleadings and the appeal was decided on other grounds.

JUDGMENT.

By President: The Plaintiff (now Respondent) sued the Defendant (now Appellant) his son by his third wife, for a declaration of rights declaring that the latter is not his heir but that Frank, his son by his fourth wife is, and alleged in the particulars of his claim—

- (1) that Plaintiff and Defendant are Xesibes;
- (2) that Plaintiff is a Chief, his father being the brother of Jojo the Paramount Chief of the Xesibes.
- (3) that Defendant is the eldest son of Plaintiff's third wife.
- (4) that Plaintiff's fourth wife was put into the Great House on the death of Plaintiff's first wife and her eldest son Frank is Plaintiff's heir.
- (5) that as Plaintiff's first two wives had no male issue Defendant considers himself to be Plaintiff's heir and has made that claim at the Great Place.
- (6) that in or about the month of April, 1921, Plaintiff at a Public Meeting specially called for the purpose publicly announced that the Defendant was not his heir and that his son Frank was his heir and advised the Magistrate of Mount Ayliff accordingly.
- (7) that Defendant still persists in claiming the heirship.

The Defendant pleaded:—

- (1) Defendant admits paragraphs 1, 3 and 7 of the summons.
- (2) Defendant denies that Plaintiff is a chief, but admits that Plaintiff's father was a brother of Jojo, Chief of the Xesibes.
- (3) In reply to paragraphs 4 and 5, Defendant denies that Plaintiff's fourth wife was put into the Great House, and states that the fourth wife (Majezana) was married during the lifetime of the chief wife (Magwayishe) in the Great House, and further denies that the eldest son, Frank, of the fourth wife is Plaintiff's heir as, according to custom, Plaintiff could not select (Beka) a chief wife and thus appoint an heir, that according to custom and Plaintiff's rank in the tribe, Plaintiff's heir is the Defendant, there being no son in the chief and second huts. Defendant

admits bringing an action at the Great Place claiming that he was Plaintiff's heir, and states that at the meeting at the Great Place, it was unanimously decided that Defendant was Plaintiff's heir.

- (4) Defendant admits paragraph 6 but states that Plaintiff only had a meeting of his own location, and not of the family, and further that according to custom, Plaintiff had no legal right or cause to disinherit him (Defendant); no report was made to the Jojo family of the meeting, nor was anything said that the Magistrate was to be advised of the meeting and the result. Plaintiff acted in secret regarding this meeting and the report to the Magistrate. Further the provisions of Section 11 of Proclamation No. 142 of 1910 were not observed.

After hearing considerable evidence on both sides the Magistrate gave judgment for Plaintiff as prayed—against which an appeal has been noted on the grounds—

- (1) that the Magistrate has no jurisdiction in the case as it stands and on the evidence led;
- (2) that the case for Plaintiff is based purely on hearsay evidence;
- (3) that the case is one contrary to Native custom;
- (4) that Plaintiff is not a chief and cannot elect his chief wife, that his wives rank in the order they were married;
- (5) that according to custom if the chief wife had a "Qadi," it would be the third wife, the mother of Defendant;
- (6) that if Plaintiff departed from the custom prevailing amongst natives, he must put forward and prove his case beyond doubt which he has not done.

Comprehensive reasons were given by the Magistrate for his judgment as follows:—

"In this case Plaintiff asks for a declaration of rights that Defendant is not his heir but that his son Frank is.

"It appears that the Plaintiff and Defendant are Xesibes and that Plaintiff is the son of a brother of the Chief Jojo and on those grounds claims that he is a Chief and therefore entitled to nominate a Great wife from amongst his wives. If this were the case an action of this sort would have been quite unnecessary as the right of a Chief to nominate a wife is undisputed and a custom of long standing. Unfortunately although it would appear from the evidence that this is a point vitally affecting the issue I am unable to find that to be the case, as although it is clear to me that Plaintiff is not a Chief or at any rate if he is a Chief he is not a Chief of such rank that he has the power to nominate a Great

wife, I find that his claim for a declaration of rights still stands to be considered on other grounds and it therefore becomes necessary closely to examine the evidence.

“ Plaintiff’s case is that he married four wives and that they were Mangwaishe, Mammamata, Madayela and Majizana. That Defendant is the eldest son of the third wife and the son Frank the eldest son of the fourth wife. These wives were married in the order in which the names are now given the first being the Great wife, the second the Right Hand wife, the third was married into Plaintiff’s father’s (Fikeni’s) hut as a seed raiser and the fourth was put into the Great wife’s hut as the latter had no male issue. The Great wife died without male issue and therefore the son Frank being the eldest son of the woman put into the Great House became the heir to that house.

“ Plaintiff’s evidence clearly describes the sequence of events as narrated above and his five witnesses corroborate his story. The evidence of Mbizweni, a Chief of excellent reputation, is strongly in support of the Plaintiff’s story.

“ The evidence for the defence goes mainly to prove that Plaintiff is not a Chief of such rank that he can nominate a wife and does not bear much on the actual facts concerning the wives of Plaintiff. Several defence witnesses also lay stress on the fact that according to custom the third wife is the “ Qadi ” to the Great wife.

“ The chief points on which the issue depends are therefore :—

- (1) Is Lukuni a Chief?
- (2) Can he be said to be nominating a Great wife when he puts a woman into the Great wife’s hut?
- (3) Can he ignore the claims of the third wife to position of “ Qadi ” or of seed bearer to the Great House?

“ As regards the first question I have already stated that I am satisfied that Lukuni’s rank does not entitle him to nominate a Great wife.

“ The second point to decide is the position of Lukuni’s third wife. He states she was married for his father Fikeni’s hut to raise an heir to that hut. His witnesses corroborate this and the Chief Mbizweni clearly states that during the case *Billy versus Lukuni*, Plaintiff said that he had married this woman and put her into his father’s house. I find this to be proved and as it is in accordance with Xesibe custom (*vide Ntla versus Mucisana* 1 N.A.C. 68) this woman Madayela would therefore not bear an heir to Lukuni but to Fikeni. That being so the fourth wife married by Lukuni would be entitled to be attached to the Great House and her son Frank would be heir to that house. Mangwaishe had no male issue and Lukuni was acting in accordance with custom in putting a seed bearer into that house.”

The first ground of appeal has not been pressed.

This Court is in agreement with the Magistrate's view that the Plaintiff's position in the Xesibe tribe is not such as entitles him to nominate his Great wife.

This Court has ruled repeatedly that the wives of a man of Plaintiff's status rank according to the sequence of their respective marriages.

The Plaintiff's claim is based on the specific allegation that his son Frank, by his fourth wife, is his heir inasmuch as his first and second wives having no male issue the fourth wife was, on the death of the first wife, put into the Great House.

As the third wife, the Defendant's mother, would ordinarily have been the " Qadi " to the Great House it would not be competent for the fourth wife to displace her in the manner alleged.

The Native Assessors having been consulted state that it is not inconsistent with Native custom for a man who has already succeeded to the whole of his father's estate to marry a minor wife into one of the houses of the deceased father in which there has been no male issue.

Mdunyclwa, Reuben Nota, and Velile, further state that when a man has no male issue in his two principal houses he cannot marry his third wife into his father's house as, there being no male issue in either of his own major houses, a son by this woman would be his heir.

With this expression of opinion Lekhoasa and Ntebe do not agree.

It is not necessary for the purposes of this case for the Court to decide to what extent these customs exist, and, if they do, whether it would be prepared to recognize them, as, in this Court's opinion, the plaintiff has failed to establish his allegations that the fourth wife, Frank's mother, was put into his Great House on the death of Plaintiff's first wife.

Even if it were competent for the Plaintiff to marry his third wife into his father's house and confer upon his fourth wife the status of the former such unusual procedure would have to be established in the clearest manner.

The appeal is accordingly allowed with costs and the judgment in the Court below altered to one for Defendant with costs of suit.

1926, August 12.

Lusikisiki.

NDENI *vs.* DLULUMZI.
(Libode Case.)

Before J. M. Young, Ag. C.M., President, with O. M. Blake-
way and E. W. Bowen as Assessors.

Assegai or "Mkonto" Custom—Great wife.

The facts of the case are not material.

JUDGMENT.

By President: The questions involved in this appeal are:—

- (1) Whether the custom known as "Mkonto" or assegai custom was observed at any time in Pondoland.
- (2) Whether Respondent's father married his mother under this custom.
- (3) If he did so, what status did she acquire.

At the request of the parties, the issues raised in (1) and (2) above were put to the Native Assessors, who state:—

"Such a custom did exist many years ago, but we have no knowledge of it ourselves. The custom we know is that the woman who first comes to the kraal, and for whom a wedding feast is made, is the great wife. This does not apply to such chiefs who have the right to nominate or appoint the great wife."

They further state that if a young man marries another girl after the assegai is accepted, and no marriage feast has been held for her, the assegai girl becomes the first or great wife but if a marriage feast for the girl first taken is held, the assegai girl would rank as the second or right-hand wife.

The Assessors from Western Pondoland are not in agreement with the latter part of this statement. They state that the assegai girl would be the great wife, even if a feast was held for the girl first brought to the kraal.

The Magistrate has found on the evidence that the Respondent's mother was married under the "Mkonto" custom many years before Annexation, that she has always been recognized by the family as the great wife, that the estate property of Noqam and Malangeni was handed to Respondent many years ago, that no exception was taken to this by the Appellant, and that refunds of contributions towards the dowries paid on behalf of Noqam's brothers and the Appellant were made to the Respondent.

In view of all the circumstances of the case, and more particularly the fact that the marriage took place before Annexation, when such a custom appears to have been observed, this Court sees no reason to disturb the findings of the Magistrate.

The appeal is dismissed with costs.

1926, July 13.

Umtata.

XATULA *vs.* XATULA.
(Qumbu Case.)

Before J. M. Young, Ag. C.M., President, with W. J. Davidson and G. M. B. Whitfield as Assessors.

Property pertaining to kraal—In temporary absence of husband guardian of wife cannot deprive her of, or compel wife to leave kraal.

The facts are immaterial.

JUDGMENT.

By President: It is an established principle of Native law that a widow or a woman whose husband is temporarily absent has the right to insist on the property pertaining to her house remaining at the kraal established for her as long as she lives at that kraal.

In the present case the kraal at which the Respondent resides is admittedly that of her husband, whose absence at a mental institution may be of a temporary nature, and the Appellant has neither the power to compel her to leave it nor to deprive her of the property. It is his duty to exercise supervision over the affairs of the kraal and if his own kraal is too far distant for him to do so properly and efficiently, he should follow the customary practice and send some male member of the family to the kraal as his representative.

The appeal is dismissed with costs.
